90-783

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

October Term, 1990

VILLAGE OF LOS RANCHOS DE ALBUQUERQUE and RIO GRANDE VALLEY PRESERVATION SOCIETY,

Petitioners,

v.

R.H.BARNHART, Administrator of the Federal Highway Administration, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

I. Is a state highway project always exempt, as a matter of law, from federal environmental requirements, despite extensive federal involvement in the project, including federal development funds, location approval from the Federal Highway Administration and eligibility for further federal funding, if it has not actually received federal construction funds?

II. Is the Montaño Bridge Project to cross the Rio Grande a "major federal action" or "federal or federally assisted undertaking" within the purview of federal environmental and historic preservation laws as a result of the "exhaustive" involvement and control of the project by the National Highway Administration and the U.S. Army Corps of Engineers?

PARTIES

VILLAGE OF LOS RANCHOS DE ALBUQUERQUE, RIO GRANDE VALLEY PRESERVATION SOCIETY,

Petitioners,

and

ELBERT KING, JOAN McGINNIS, VELMA WHIPPLE, TOMAS MONTOYA, PRICILLA MONTOYA, JOHN TROTTER AND KIT SARGEANT,

Plaintiffs,

v.

R.H.BARNHART, Administrator of the Federal Highway Administration, ELIZABETH DOLE, Secretary of the Department of Transportation, PETER A. LOMBARD, Environmental Protection Specialist for the Federal Highway Administration, DANIEL DAKE, Director, Office of Planning and Programming Development of the Federal Highway Administration and DEWEY LONSBERRY, Federal Highway Division, Administrator, CITY OF ALBUQUERQUE, and THE COUNTY OF BERNALILLO,

Respondents.

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VILLAGE OF LOS RANCHOS DE ALBUQUERQUE and RIO GRANDE VALLEY PRESERVATION SOCIETY,

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R.H.BARNHART, Administrator of the Federal Highway Administration, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners, Village of Los Ranchos de Albuquerque, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Tenth Circuit, entered in the above-entitled proceeding on June 2, 1990, with petitioners' rehearing petition denied on August 22, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 906 F2d 1477, and is reprinted in the appendix, p. 1a, *infra*. The denial of rehearing in the Tenth Circuit is reprinted in the appendix at p. 34a, *infra*.

The memorandum decision of the United States District Court for the District of New Mexico (Burciaga, D.J.) has not been reported. It is reprinted in the appendix, p. 36a, *infra*.

The memorandum decision of May 8, 1989, of the United States District Court

for the District of New Mexico (Conway, D.J.) in a related case, *Village of Los Ranchos v. Hatch*, No. CIV 88-1032JC (D.N.M.), *see* p. 5, *infra*, has not been reported. It is reprinted in the appendix hereto, p. 70a, *infra*.

JURISDICTION

The decision, order and opinion of the United States Court of Appeals for the Tenth Circuit affirming the decision of the trial court was entered on July 2, 1990 and is reported at 906 F2d 1477 (10th Cir. 1990). The Court's order denying rehearing was entered on August 22, 1990.

Jurisdiction is conferred on this Court to review the order by writ of certiorari to the Tenth Circuit Court of Appeals by 28 USC §1254(1).

The jurisdiction of the United States District Court for the District of New Mexico was invoked pursuant to 28 USC §1331 (federal question) and 28 USC §§2201-2202 (declaratory judgment). The jurisdiction of the Tenth Circuit Court of Appeals was invoked pursuant to 28 USC §1291.

RELATED CASES

1. *Village of Los Ranchos de Albuquerque, et al., v. Lt. Gen. Hatch, Chief of Engineers, U.S. Army Corps of Engineers, et al.*, No. CIV 88-1032JC (the "*Hatch*" case), United States District Court for the District of New Mexico, currently on appeal to the United States Court of Appeals for the Tenth Circuit, Nos. 90-2012, 90-2026 and 90-2052 (unconsolidated appeals). Summary judgment in favor of the federal defendants was granted on June 9, 1987 by the District Court. Briefing is complete and oral argument has not yet been set in the Tenth Circuit. One of three memorandum decisions rendered in the *Hatch* case is set out in the appendix at p. 70a, *infra*.[1]

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[1] In the *Hatch* case the Village of Los Ranchos de Albuquerque and other plaintiffs have sued the U.S. Army Corps of Engineers following its issuance of a

2. *State of New Mexico, ex rel., Village of Los Ranchos de Albuquerque, et al., v. City of Albuquerque*, No. CV-89-02766, New Mexico District Court for the Second Judicial District. A preliminary injunction halting work on the Montaño Bridge Project was issued by the District Court on June 16, 1989 and the City of Albuquerque took an interlocutory appeal to the New Mexico Court of Appeals (No. 11688). The case has been briefed and argued. A decision is pending. The memorandum decision in the state case is not included in the appendix.[2]

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permit pursuant to §404 of the Clean Water Act, 33 USC §1344, to the City of Albuquerque to dredge and fill the Rio Grande for the Montaño Bridge Project. The basic allegation is that in failing to prepare an EIS or supplement the one prepared by the FHWA the Corps has violated National Environmental Policy Act, 42 USC §4332 (NEPA).

[2] The basis of the Preliminary Injunction is that the bridge will be a public nuisance because of noise, injury to

STATUTES INVOLVED

16 USC §470 *et seq.*, National Historic Preservation Act (NHPA). Reprinted at Appendix, pp. 105a-106a.

23 USC §138, Federal-Aid Highways Act (FAHWA). Reprinted at Appendix pp. 107a-109a.

33 USC §1344, Clean Water Act. Reprinted at pp. 110a-118a.

42 USC §4321 *et seq.*, National Environmental Policy Act (NEPA). Reprinted at Appendix, pp. 119a-125a.

49 USC §303, Department of Transportation Act (DOTA) §4(f). Reprinted at Appendix pp. 126a-127a.

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historic sites and injury to wildlife habitat in the bosque.

STATEMENT OF THE CASE

This case concerns a controversy over the Montaño Bridge Project of the City of Albuquerque ("City"). The Project involves construction of a bridge across the Rio Grande in north-central New Mexico which will necessarily destroy many acres of rich riparian wildlife habitat and wetland and fracture an unbroken six mile segment of riparian bosque (forest and wetland). The bridge and its approach road will pass through Los Poblanos National Historic District. It will also bifurcate the Village of Los Ranchos de Albuquerque, an incorporated village located north of the City of Albuquerque.

Petitioners are the Village of Los Ranchos de Albuquerque and the Rio Grande Valley Preservation Society (collectively with certain individual residents of the

North Valley of Albuquerque, who were plaintiffs below but are not petitioners, referred to herein as the "Village").

The Village brought suit in the United States District Court for the District of New Mexico on August 30, 1984. It sought declaratory and injunctive relief following decisions of the Federal Highway Administration ("FHWA"): 1) to approve an Environmental Impact Statement ("EIS") by the New Mexico State Highway Department ("NMSHD"), 2) to give location approval to the river-crossing sites recommended by the location study and 3) not to prepare a site-specific EIS for the approved river-crossings of the Rio Grande in the North Valley of Albuquerque.

The Complaint sought to enjoin the federal defendants from proceeding with the North Valley River Crossings until such time as they complied with the National

Environmental Policy Act of 1969 ("NEPA"), 42 USC §4321, *et seq.*; the National Historic Preservation Act ("NHPA"), 16 USC §§470-470W-6; §4(f) of the Department of Transportation Act ("DOTA"), 49 USC §303; the Federal-Aid Highways Act ("FAHWA"), 23 USC §138[3]; and Executive Order 11990 (1977)(Protection of Wetlands).

In 1979 the NMSHD requested FHWA financial and technical assistance in preparing a location study for additional river-crossings in the North Valley. The state requested the assistance from the FHWA, in part, because

> Factors which led the UTPPB to make the decision to conduct a location-environmental study were: ... 4) Section 404 permits would be required from the U.S. Army Corps of

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[3] Both 49 USC §303 and 23 USC §138 are usually referred to as "§4(f)," the former section number by which the parkland and historic property protection provision became well known.

> Engineers before construction of the bridges could commence, thus federal National Environmental Policy Act compliance relating to the Section 404 permit applications would be required in any event.

Dist.Ct.Mem., p. 42a-43a, n.2, *infra*. By a federal-aid project agreement and Letter of Approval and/or Authorization, FHWA agreed to provide nearly $59,000 of the $75,000 cost of the location study and associated EIS. In addition to funding the location study and the option evaluating EIS,

> "it is safe to say that the actual preparation of the EIS required fairly exhaustive[4] federal assistance from approving agencies and individual FHWA personnel. The process is lengthy and, ... the actual sufficiency of the EIS itself is not at this time before the Court...."

906 F2d at 1479, p. 5a, *infra* (quoting Burciaga, D.J., p. 44a, *infra*).

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[4] The Tenth Circuit substituted the word "exhaustive" for the word "extensive," which was the word used by the District Court.

The location study determined that six additional river-crossing lanes were needed and selected two new bridge locations in the North Valley at El Pueblo and Montaño to provide the lanes. FHWA then reviewed and approved the location study. *See* Record below, Doc. 100, Defendants' Summary Judgment Memorandum, Ex. 1, ¶4. Doc. 111, Plaintiffs' Response, Ex. 1, p. 10.

In 1983, FHWA entered into a formal Memorandum of Agreement with NMSHD, which committed FHWA to continued monitoring of and involvement in the Montano bridge project. *See* Record below, Doc. 100, Defendants' Memorandum, Ex. 1A, Vol. 2, p. 1-T; Ex. 8B, p. 9. Moreover, although construction of the project is currently funded solely by City monies, the City retains the option of seeking reimbursement via the federal-aid highway system. *See*

Record below, Doc. 111, Plaintiffs' Response, Ex. 4. In fact, the federal defendants have specifically and formally granted the City and/or State permission to proceed to the next stage for requesting federal funding. *See* Record below, Doc. 100, Ex. 8B, Ex. 9, pp. 39-43.

The part of the lawsuit relating to El Pueblo (now Paseo del Norte) bridge was settled on October 11, 1985. Only the Montaño bridge project is at issue in this Petition. The District Court granted the federal defendants' Motion for Summary Judgment on June 9, 1987. P. 66a, *infra*.

The City of Albuquerque and County of Bernalillo's Motion to Dismiss[5] was granted on October 7, 1987. p. 68a, *infra*. Appeal

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[5] The claims against the City and County Defendants were dismissed on the same basis as the District Court's grant of summary judgment in favor of the Federal Defendants.

to the Tenth Circuit was timely taken.

In the lawsuit the Village sought 1) review of the adequacy of the EIS and 2) restriction on federal approval of the location study and further federal action until the federal agencies comply with NEPA, NHPA and §4(f).[6] Several aspects of the Opinions of the District Court and the Tenth Circuit require emphasis:

1. Both courts held that "federal involvement with the bridge project[] was minimal, and, as a matter of law, did not

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[6] Both the Draft EIS and Final EIS prepared by the NMSHD and FHWA in cooperation with, *inter alia*, the U.S. Army Corps of Engineers, were relied upon by the Corps in preparing its Environmental Assessment ("EA") of the Montaño project and granting a dredge and fill permit to the City §404(b) of the Clean Water Act. The DEIS and FEIS are incorporated into the EA and supporting Administrative Record. The Village was not permitted to challenge the EIS in either the case against the preparing agency, the FHWA, or the case against the Corps (the *Hatch* case).

rise to the level of 'major federal action' so as to bring the project within the purview of federal environmental laws." Pp. 18a and 38a, *infra*. In doing so both courts restricted their analysis to two factors:

a. A state highway project that may, but has not yet, received federal highway construction funds, can **never** be a "major federal action." *See* pp. 13a-15a, *infra*.

b. Federal funding for and "exhaustive" involvement in the decision-making process of selecting and approving river-crossing locations is insignificant to an analysis of whether a project is a "major federal action" or a "federal or federally assisted undertaking." *See* pp. 15a-20a, *infra*.

2. Both courts used EIS preparation and "location approval" interchangeably. The Tenth Circuit equated the location study, EIS and location approval. At footnote 2, 906 F2d 1477, 1481, p. 15a, *infra*, the Tenth Circuit struggles with the distinction and cites the following from the Village's Reply Brief:

> it is the funding and preparation assistance by the FHWA of the location study **that preceded the EIS that triggers NEPA.** (emphasis added)

The Court says a location study is somehow "lesser" than a "greater" preparation of the EIS. Therefore, since a lesser cannot control a greater, the Court says:

> [W]e construe plaintiffs' argument as stating that the EIS, which in this case includes the location study, is the major federal action.

The Court then goes on to say that since an EIS can never be a "major federal action," there was no major federal action here. *See*

906 F2d at 1481-82, pp. 15a-17a, *infra*.

Neither Court considered nor analyzed the location study with its federal funding and "exhaustive" federal assistance as the major federal action triggering the evaluative document called an EIS. If a proper and comprehensive EIS had been prepared it would have provided the FHWA with a useful tool to use in deciding whether to grant location approval. The Village is prepared to prove that the EIS utilized by the FHWA was inadequate.

3. The Court cited *Sierra Club v. Hodel*, 848 F2d 1068, 1089 (10th Cir.1988) at pp. 18a-20a, for the proposition that

> "[T]he distinguishing feature of 'federal' involvement is the ability to influence or control the outcome in material respects. The EIS process is supposed to inform the decision-maker. This presupposes he has judgment to exercise."

906 F2d at 1482, p. 19a, *infra*. Having made

this distinction, the Tenth Circuit nevertheless then stated that the "federal government had [no] actual power to control this project. At most, it gave advice as to the location of the bridge. Thus, we do not here have any 'major federal action.'" 906 F2d at 1482, p. 20a, *infra.* Neither court analyzed their conclusions that a) location approval authority is not the real "ability to influence or control" the location of a highway project, or b) that location study and approval and EIS funding, production and approval are not a very real ability to control the outcome and eventually control and influence the U.S. Army Corps of Engineers ("Corps")' §404 permit decision as well.

4. Both courts address the issues raised by the Village regarding the National Historic Preservation Act (NHPA),

16 USC §470 *et seq.* and §4(f) of the Department of Transportation Act, 49 USC §303 and 23 USC §138, and Executive Order 11990, as subsets of the analysis of "major federal action." Insofar as each act required that a covered project be a "Federal or federally assisted undertaking," the courts held that the project was not "federal" based upon the analysis of the EIS and therefore not subject to federal law.

5. The Tenth Circuit ignored and the District Court did not discuss, except to mention in n. 2, Memorandum Opinion, p.42a-43a, *infra*, that a principal reason for the state's request for federal involvement was the known requirement that a §404 permit from the Corps and NEPA compliance would be required "before construction of the bridges could commence."

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's decision that a highway project which is eligible for Federal construction funds and has received "exhaustive" Federal assistance, planning funds, and location approval is, nevertheless, not a "major federal action" nor a "federal or federally assisted undertaking" if federal funds for actual construction have not been used or approved a) conflicts with decisions of other Circuits and b) unreasonably restricts the reach of 42 USC §4321 *et seq.* (NEPA), 16 USC §470 *et seq.* (NHPA), 23 USC §138 (FAHWA), and 49 USC §303 *et seq.* (DOTA).

Without statutory authorization, the Tenth Circuit has restricted the scope and sweep of the National Environmental Policy Act of 1969 (NEPA), 42 USC §4321, *et seq.*, the National Historic Preservation Act (NHPA), 16 USC §470, *et seq.*, the Federal-Aid Highway Act (FAHWA), 23 USC §138, and the Department of Transportation Act (DOTA), 49 USC §303. The Court arbitrarily removed from the scope of these statutes every

state highway project which had not, at the time it is challenged, received federal funds for post-planning and location approval construction or had such funding approved. Pp. 12a-15a, *infra*.

The Court excluded from the scope of NEPA, NHPA, FAHWA and DOTA, federal involvement which logically falls within the intent of Congress. Both courts below, for example, erroneously assumed that the state "did not initially need any type of **federal** approval" and that the basis of federal status was the approval of the EIS. Pp. 16a, 54a-55a.

The actual basis of the federal status remains a combination of federal funding of the location studies and the EIS, the location approval, eligibility and preliminary application for and preliminary approval of federal funding, and the

requirement that a §404 dredge and fill permit from the Corps be obtained for **every** possible bridge location. Moreover, the granting of such a permit was always a "major federal action" and was a known requirement from the beginnings of the project. *See* p.42a-43a, n.2(4).

The Tenth Circuit's restrictions on these federal acts are similar to, and go far beyond, the restrictions set out in *Citizens for Balanced Environ. & Transp., Inc. v. Volpe*, 376 FSupp 806, 812-813 (D.Conn.), *aff'd per curiam*, 503 F2d 601 (2nd Cir.1974), *cert. denied*, 423 US 870 (1975). Both the Second and Tenth Circuits sharply criticized and rejected the analysis adopted by the Ninth Circuit in *La Raza Unida v. Volpe*, 337 FSupp 221 (N.D.Cal. 1971), *cert. denied* 409 US 890 (1972) (prematurely filed), *supplemented by* 57 FRD 94

(attorney's fees), *aff'd* 488 F2d 559 (9th Cir. 1973), *cert. denied*, 417 US 964 (1974). *See* pp. 10a-15a, *infra*. The Tenth Circuit adopted the reasoning of the Second Circuit which focused on, disagreed with and disparaged the *La Raza* court's determination that a state option to use federal funds brings it within the purview of the federal acts. *Compare La Raza*, 488 F2d at 561-62 (9th Cir.) and 337 FSupp at 226-27 (N.D.Cal.); *with Citizens*, 503 F2d at 602 (2nd Cir.) and 376 FSupp at 812-813 (D.Conn.) and 906 F2d at 1481-82 (10th Cir.), pp.12a-14a, *infra*.

The Circuit Courts disagreed again in their analyses of other relevant factors. While the Tenth Circuit determined that "[]significant" federal funding was a necessary prerequisite to "major federal action" status, the *La Raza* court found and

held precisely the opposite. The Ninth Circuit specifically rejected the argument that federal environmental laws do not apply until construction funds are provided.

> We do not agree with the Commission's interpretation of these provisions. The general purpose of these statutes and regulations is to assure that projects for which federal funding might become available are carried out in a way that will afford the protection to those displaced ... and to the environment, including public parks,....
>
> We believe Judge Peckham correctly interpreted the applicable statutes and regulations to require compliance by the Commission with those provisions ... protecting the environment "before location approval, [and] prior to federal funding of a project." La Raza Unida v. Volpe, 337 FSupp 221, 231 (N.D.Cal.1971).

La Raza, 488 F2d at 562. The District Court in *La Raza* discussed location approval in some detail, noting that "the state and federal defendants concede that a project becomes part of the federal-aid highway

system upon location approval...." 337 FSupp at 227.[7]

The Tenth Circuit's new requirement of "[]significant" amounts of federal funding (p.17a-18a, (*infra*) to trigger NEPA, NHPA, FAHWA and DOTA, is in conflict with other Circuits as well. *See, e.g., River v. Richmond Metropolitan Authority*, 359 FSupp 611, 628 (E.D.Va. Richmond Div.1973). In that case the Court stated, albeit in dicta,

Courts have recognized situations in

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[7] "Location approval" is a specific step in the process of obtaining federal construction funds. It is step two following "systems approval" and preceding "design approval" in the process for obtaining federal funds pursuant to 23 USC §103 and FAHWA Policy and Procedures Memorandum 20-8. *La Raza Unida v. Volpe*, 337 FSupp 221, 223-24 (N.D.Cal.1971). The EIS was an evaluative tool focusing on generalized impacts to the broad reach of the North Valley and not specific to the locations of the preferred alternatives. The location approval is a step which involves the exercise of judgment by the FHWA.

> which no federal funds have been authorized for a particular highway, yet the highway has, through various circumstances, taken on such a federal character that the purposes behind the federal laws would be defeated unless their requirements are met.

359 FSupp at 628; *Scottsdale Mall v. State of Indiana*, 549 F2d 484 (7th Cir. 1977), *cert.denied*, 434 US 1008 (1978); *Indiana Lookout Alliance v. Volpe*, 484 F2d 11 (8th Cir. 1973); *City of Boston v. Volpe*, 464 F2d 254 (1st Cir. 1972). *See also*, *Named Individual Members of San Antonio Conservation Society v. Texas Highway Dept.*, 446 F2d 1013, 1027 (5th Cir. 1971).

The Court emphasized the sweep of its restriction by then apparently *defining* the DOTA, 49 USC §303, and the FAHWA, 23 USC §138, language "use of federal funds to finance construction" to exclude projects receiving federal planning funds. The Tenth Circuit cites three cases as

supporting this definition. As it happens none of the cited cases involved or discussed federal planning funds as part of their holdings nor was any distinction made in any of those cases between the funds used to plan and those used to bulldoze.

In the first cited case, *Historic Preservation Guild of Bay View v. Burnley*, 896 F2d 985 (6th Cir.1989), the project at issue had received no federal funds for planning or any other purpose. Location studies were entirely state funded[8] and the federal government had specifically rejected all federal funding for the project. *Id.* at 989. At no time did the state request federal

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[8] As noted above, the funds utilized by the NHWA and NMSHD were supplied as part of the federal-aid highway program. Pp.10-11, *supra*; federal-aid project agreement and Letter of Approval and/or Authorization, both dated February 5, 1979. *See* Record below, Doc. 100, Ex. 8A.

funding. *Id.* Indeed, the Fifth Circuit distinguished the Michigan fact situation from one like Montaño in describing the difference between its facts and those in *Scottsdale Mall v. State of Indiana*, 549 F2d 484 (7th Cir. 1977), *cert.denied*, 434 US 1008 (1978):

> This absence of federal funding is not necessarily dispositive in determining whether a highway project is imbued with a federal character....
>
> Since the entire project [Scottsdale Mall] had been planned in accordance with federal programming and procedural requirements, and had received design approval from the Department of Transportation in addition to some federal funds for preliminary engineering studies, the court concluded that the project was a federal project, and was therefore subject to the requirements of the National Environmental Policy Act. 549 F2d at 489."

896 F2d at 985. The Tenth Circuit admits that *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F2d 75 (4th Cir.1989), did not decide whether §4(f) applied when only federal

planning funds were present. In the opinion the Fourth Circuit describes its earlier opinion[9] in which it utilized numerous grounds to reverse the District Court and remand for compliance with §404 of the Clean Water Act and §6(f) of the Conservation Act. In dicta it noted it might also have to comply with §4(f). Its citation to *Citizens to Preserve Overton Park v. Volpe*, 401 US 402, 411 (1971), says nothing more than that the expenditure of "federal funds" virtually always requires compliance with federal environmental laws. Neither Congress nor this Court has ever qualified the words "federal funds" with the addendum "except those used for planning."

In addition to its lack of support for its analysis, the Tenth Circuit opinion is

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[9] *Maryland Conservation Council v. Gilchrist*, 808 F2d 1039 (4th Cir.1987).

in direct conflict with the Fifth Circuit's opinion in *Named Individual Members of San Antonio Conservation Society v. Texas Highway Dept.*, 446 F2d 1013, 1027-28 (5th Cir. 1971). In that case the State of Texas informed the Fifth Circuit that if federal law interfered with construction, it would proceed with "100% state money." The Fifth Circuit stated that once federal involvement begins, federal law applies regardless of any change in funding method.

The Tenth Circuit similarly defines the words "proposed Federal or federally assisted undertaking" in the NHPA, 16 USC §470f, p. 105a-106a, *infra*, to mean "[]significant" amounts of federal funds. Pp. 26a-28a, *infra*. This definition is not found in the statute. The regulations cited by the Village and discussed in footnote 6 to 906 F2d at 1484, p. 27a-28a,

infra, state the opposite.

The Tenth Circuit appears to invalidate 36 CFR §800.2(c)(1986) (definition of "undertaking") as exceeding its statutory authorization.[10] Fortunately, the statute does not contain the restrictive language suggested by the Tenth Circuit and therefore the regulation, as modified, 36 CFR §800.2(o) (1989), should be upheld as a proper administrative

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[10] The "definitions" section of the regulations of the Advisory Council on Historic Preservation has been revised and renumbered. The definition referred to by the Tenth Circuit is now 36 CFR §800.2(o)(1989), p. 138a, *infra*, and has not changed in any material way. It now reads, in pertinent part,

> "Undertaking" means any project, activity, or program that can result in changes in the character or use of historic properties....**The project... must be** under the direct or indirect jurisdiction of a Federal agency or **licensed or assisted by a Federal agency.**

Id. (emphasis added).

interpretation of the statute. The only case cited by the Tenth Circuit, *Lee v. Thornburgh*, 877 F2d 1053 (D.C.Cir.1989) involved a project using exclusively District of Columbia funds directly appropriated by Congress. Both the District and Congress are specifically exempted from the NHPA. *Id.* at 1056. Nevertheless, the interpretation of the NHPA by the District of Columbia Circuit Court supports the **inclusion**, not exclusion, within the ambit of the NHPA of projects receiving federal funds of any sort. *Id.* at 1057.

The majority of federal courts have held that providing planning funds, location approval, authorization of future federal participation or a combination of these and other factors are each sufficient to confer "major federal action" status

under NEPA. The Montaño Bridge Project, which has received both federal location approval and authorization of continuing federal participation, should be treated as a major federal action.

The confusion engendered by the ever more disparate positions of the Circuit Courts on these issues deserves this Court's attention. Moreover, the clear error of the courts below warrants review and reversal by this Court. Plenary consideration of this matter by this Court is essential. The Village urges this Court to issue its Writ of Certiorari to the Tenth Circuit.

II. Despite the confluence of the FHWA location approval and the assertion of jurisdiction and "major federal action" status by the Corps of Engineers, the Tenth Circuit's decision that the Montaño Bridge Project is not a "major federal action" raises important and unresolved problems.

As described above, the Montaño Bridge Project had received federal location and environmental study funds and location approval from the FHWA and, at all times, required a permit from the Corps pursuant to §404 of the Clean Water Act to dredge and fill the river before any construction could occur. In the *Hatch* case, the Corps, a federal agency, and the U. S. District Court have determined the Montaño bridge project to be a "major federal action" for NEPA purposes. This determination is relevant to the decision in this case. *See* p.70a, *infra*, Memorandum Opinion, *Hatch*, at p.98a ("it is true that the [§404] permit

forms the indispensable basis for any construction of the bridge").

In adopting the analysis of Judge Newman in *Citizens for Balanced Environ. & Transp., Inc. v. Volpe*, 376 F.Supp. 806, 812-813 (D. Conn.), *aff'd per curiam*, 503 F2d 601 (2nd Cir.1974), *cert. denied*, 423 U.S. 870 (1975), the Tenth Circuit has ignored the final point of analysis by Judge Newman:

> Though not specifically urged by plaintiffs, it might be appropriate in some cases to reach a conclusion of "Federal action" based on the cumulative effect of the various factors considered in this opinion. The federal dollars to build the spur that will connect new Route 7 to I-84 and the small amount of highway planning and research funds, the "route revision" approval by the FHWA and the state's continued eligibility for federal funding for later projects north of Danbury, and the relationship between the Danbury-New Milford portion and the Norwalk-Danbury portion may well be considered to have a greater total effect than any

factor alone.

376 F.Supp. at 814.

He concluded that although "the question on these facts is close, it does not appear that the federal government has played a sufficient role..." to make the project a major federal action. *Id.* Included within the list above are past and future actions relating to the project at issue, but conspicuously absent is a location approval, a §404 dredge and fill permit or other conclusively "major federal action."

The facts in *Citizens* did not include any factor which was indubitably "a major federal action." Nor was it clear that the Connecticut project itself would **necessarily** become a major federal action. This is significantly different from the Montaño Bridge Project.

From the beginning of the Montaño project, through all phases of federal or state consideration, it was known and recognized that the Montaño Bridge Project required a permit to dredge and fill the Rio Grande from the Corps pursuant to §404(b) of the Clean Water Act, and that the granting of such permits is a "major federal action." 33 CFR §320, *et seq.*; *Save Our Wetlands, Inc. v. Witherspoon*, 638 F.Supp. 1158, 1161 (E.D.La. 1986).

In its funding and coordination of the project the FHWA was acting at all times as the first federal actor in the §404 permitting process. Other evidence of the continuous, cumulative process can be found in a variety of sources. *See e.g.*:

1. The District Court Memorandum, p.42a-43a, *infra*. An affidavit by a City of Albuquerque officer identifies factors

leading to preparation of Rio Grande river-crossing location-environmental study:

> 4) Section 404 permits would be required from the U.S. Army Corps of Engineers before construction of the bridges could commence, thus federal National Environmental Policy Act compliance relating to the Section 404 permit applications would be required in any event.

2. The EIS was produced by the FHWA and the NMSHD with the knowledge that the project would require a federal permit. The FEIS is Exhibit 1A in the Federal Defendants' Addendum to their Answer Brief below. At p. 66 of the FEIS the FHWA and NMSHD state that the Corps aided the FEIS preparation and is "the agency which issues the required 404 Permit for the crossings of the Rio Grande."

Neither the preparation of the EIS nor the provision of federal planning funds serve as a litmus test for the determination of major federal action under

NEPA. Having adopted the test set forth in *Citizens*, 376 F.Supp. 806 (further citation *supra*), the Tenth Circuit added confusion to the matter by its failure to consider all of the known and relevant factors influencing the cumulative portion of the analysis. Here the preparation and funding of the EIS and the location study led to location approval. This was merely one step in a continuous, cumulative process of federal involvement ending in the unquestioned major federal action of considering and granting a §404 permit. The initial (planning and study funding) and intermediate (location and further funding approval) steps are part of the same stairway leading to the §404 permit. They cannot be compartmentalized or divorced from this certain final step.

When evaluating whether there is a

major federal action, a court must look to the totality of the project: all federal parts of the project should be "summed-up" to decide whether there is a major federal action. *Citizens*, 376 FSupp at 814. In *NRDC v. Calloway*, 389 FSupp. 1263 (D.Conn.1974), *rev'd on other grounds*, 524 F2d 79 (2d Cir.1975), the District Court stated at p. 1272, n. 31, that regardless of the time sequence or "lead" agency,

> "all the **federal** parts of a project should be summed in order to determine whether the project is 'major' and thus whether NEPA should apply. Concomitantly, if NEPA does apply to a project as a whole it must apply to each of its parts."

Indeed it violates the clearly stated intent of Congress to treat one part of a project as an "isolated 'single-shot' venture," *NRDC v. Calloway*, 524 F2d at 88, without coordination and consideration of

related federal actions and projects and the further actions contemplated. *Id.*; CEQ Regulations, 40 CFR §§ 1501.6 and 1501.7 (pp. 144a-146a, *infra*); *See also* S.Rep.No.91-296, 91 Cong., 1st Sess. 5 (1969).

The EIS was primarily prepared with federal funds, under at least the partial control of and subject to the eventual approval of the FHWA. The process received "exhaustive" federal assistance with input from the Corps, and with the knowledge that every possible location for a bridge required a §404 permit.

Since the granting of such a permit was also necessarily a major federal action, the federal preparers of the location studies for the Montaño bridge project should have designated the project a major federal action at the earliest preparation stage. *Forty Most Asked Questions*

Concerning CEQ's NEPA Regulations, 46 Fed.Reg. 18026 (1981) (Questions and Answers: No.9, pp. 176a-179a, *infra*, agencies must integrate the NEPA process into other planning at the earliest possible time, including "scoping" the possible involvement of other agencies and whether an applicant will eventually seek federal approval; No.14b, pp. 185a-187a, *infra*, & No.21, pp. 190a-194a, *infra*, every effort should be made to prepare joint federal review documents and avoid duplication of efforts). *Accord*, 40 CFR Part 1500, *et seq.* (1986), pp.139a-141 (early NEPA application), 146a-150a (Scoping), 158a-159a (Tiering), 163a-167a (Major Federal Action & Scope), 167a-171a (Significantly) and 171a-172a (Tiering), *infra*.

The Tenth Circuit itself has recognized that when determining whether

there is a major federal action the CEQ regulations mandate that the court should consider non-federal actions which are potentially subject to Federal control and responsibility. *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988), *citing*, CEQ regulations, 40 CFR §1508.18. Although this case may incorporate a local project, it has at all times presented an imminent and unavoidable federal action and the actions of the FHWA should be classified as major federal action. Lower courts will obviously need guidance as our nation looks to rebuild its highway infrastructure in an era of more parsimonious federal funding.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted. The Village urges the Court to find the existence of a major federal action in this case and to consider the need for clarification and guidance to the lower courts.

Respectfully submitted,

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906 F2d 1477 (July 2, 1990)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

VILLAGE OF LOS RANCHOS DE ALBUQUERQUE; and RIO GRANDE VALLEY PRESERVATION SOCIETY,

Plaintiffs-Appellants,

and

ELBERT KING; JOAN MCGINNIS; VELMA WHIPPLE; THOMAS MONTOYA; PRISCILLA MONTOYA; JOHN TROTTER; KIT SARGENT,

Plaintiffs,

v. No. 87-2657

R.H. BARNHART, Administrator of the Federal Highway Administration; ELIZABETH DOLE, Secretary of the Department of Transportation; PETER A. LOMBARD, Environmental Protection Specialist for the Federal Highway Administration; DANIEL DAKE, Director, Office of Planning and Programming Development of the Federal Highway Administration; DEWEY LONSBERRY, Federal Highway Division, Administrator,

Defendants-Appellees,

and

THE CITY OF ALBUQUERQUE; and THE COUNTY OF BERNALILLO,

Defendants-Intervenors-Appellees.

Appeal from the United States District Court for the District of New Mexico

(D.C. No. CV-84-1273-JB)

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Attorney for Plaintiffs-Appellants.

Vicki L. Plaut (Roger J. Marzula, Acting Assistant Attorney General, William L. Lutz, United States Attorney, Albuquerque, New Mexico, Herbert A. Becker, Assistant United States Attorney, Albuquerque, New Mexico, Robert L. Klarquist, Attorney, Department of Justice, Land and Natural Resources Division, and Jean G. Rogers, of Counsel, Federal Highway Administration, with her on the brief) for Defendants-Appellees.

James H. Foley, City Attorney, and Edward R. Pearson, Assistant City Attorney, for City of Albuquerque, and Joe C. Diaz, County Attorney, and MaryAnn Lunderman, Deputy County Attorney, for County of Bernalillo, on the brief for Defendants-Intervenors- Appellees.

Before LOGAN, MOORE and EBEL, Circuit Judges.

EBEL, Circuit Judge.

Plaintiffs (The Village of Los Ranchos de Albuquerque, the Rio Grande Valley Preservation Society, and certain named residents in Albuquerque's North Valley) appeal from a decision of the United States

District Court for the District of New Mexico granting summary judgment in favor of defendants (certain officials in the Federal Highway Administration ("FHWA"), the City of Albuquerque, and the County of Bernalillo). We affirm.

FACTS

The district court summarized the relevant facts as follows:

> The North Valley river crossings project is a proposal for construction of two bridges across the Rio Grande River, one at Paseo del Norte just south of an existing crossing at Corrales Road, and another further south at Montaño Road. Construction on the Paseo del Norte has begun as of this writing, while the Montaño Bridge is still in the planning stage. Both bridges involve substantial right-of-way acquisitions within the Village [of Los Ranchos de Albuquerque], a rural community northwest of Albuquerque. Further, the project involves widening of Village roads and addition of new roads to handle the increased bridge traffic, with resulting effects of increased noise, etc., on neighboring Village landowners.

The bridge at Paseo del Norte will be a four-lane crossing with an option for later expansion to six lanes, while the Montaño crossing is proposed to be two lanes.

While few residential homeowners would react favorably to the prospect of having a major arterial traffic route built practically in their backyards, the citizens of the Village are particularly concerned about the impact of the new bridges on the rural quality of their neighborhood, various sites of historical interest in that area, and the effects of the project on the river bosque wetlands. The Village has thus brought suit under various federal environmental protection statutes, arguing that, in approving the bridge projects, the federal government is taking action which will adversely affect the environment, without adequate study and planning as required by law.

The central issue in this motion [for summary judgment] is whether or not the federal government's involvement in the river crossings project is sufficiently major to trigger the applicable statutes. Therefore, the extent of that involvement must here be set forth in some detail.

Federal involvement in the river crossings project was

initiated by a January 1979 decision of the Urban Transportation Planning Policy Board ("UTPPB") of the Middle Rio Grande Council of Governments to seek a location-environmental study of the project. This request was presented to the Federal Highway Administration ("FHWA"), where, on February 5, 1979, the Division office in Santa Fe, New Mexico, authorized preliminary engineering work in preparation of the environmental study for the river crossings project. The authorization form for the project, Defendants' Exhibit 8A, estimated the cost of the location environmental study at $75,000.00, and authorized federal financial assistance for part of these costs, in the amount of $58,972.50.

In addition to provision of funding, the federal government took an active role in the preparation of the EIS. Without going into exhaustive detail as the process is set forth in Defendants' Answers to Interrogatories, submitted as Plaintiff's Exhibit 1, it is safe to say that the actual preparation of the EIS required fairly exhaustive federal assistance from approving agencies and individual FHWA personnel. The process is lengthy and, as the actual sufficiency of the EIS itself is not at this time before the Court, the Court

> will not here reiterate those procedures. A Final Environmental Impact Statement ("FEIS") for the river crossings project was approved by Peter Lombard, Director of the Office of Planning and Program Development in the Region 6 Office of the FHWA, on September 16, 1983.
>
> After approval of the FEIS, the City of Albuquerque programmed $4.2 million of 1983 general obligation bond money for the Montaño crossing, and an additional $6.1 million was appropriated for the project from the 1985 bond election.
>
> According to the affidavit/testimony of Joseph Martin, Director of New Mexico Department of Transportation, Harry E. Kinney, former Mayor of Albuquerque, and Kenneth E. Bower, Jr., Director of Technical Support for the New Mexico State Highway Department, federal funding has not been and will not be requested for any part of the Montaño or the Paseo del Norte river crossings. Thus, as of the date of FEIS approval by the FHWA, federal involvement in the river crossing came to an end, as far as any financial assistance was concerned.

(Memorandum Opinion and Order at 3-5, June 9, 1987) (footnote omitted).

Plaintiffs sought a declaration that

the federal environmental laws were violated and an injunction against all further federal participation in the project. After considering the evidence submitted by both sides, the district court granted summary judgment in favor of the federal defendants on the ground that the FHWA's participation in the bridge projects was not sufficient to trigger the federal laws. The district court subsequently granted summary judgment in favor of the local defendants "on the same grounds as stated by the Court for dismissal of Plaintiff's complaint against the Federal Defendants." (Order at 1, October 7, 1989.) Plaintiffs appeal.

ISSUES

Plaintiffs raise four issues on appeal: (1) whether construction of the Montaño bridge is a "major federal action" subject to the requirements of the National

Environmental Policy Act; (2) if construction of the bridge is not a major federal action, whether the bridge project was properly segmented from the federally funded I-25/Los Angeles project, which is a major federal action; (3) whether construction of the bridge requires compliance with section 106 of the National Historic Preservation Act; and (4) whether construction of the bridge requires compliance with section 4(E) of the Department of Transportation Act or Executive Order 11990.

NATIONAL ENVIRONMENTAL POLICY ACT

Plaintiffs argue that the federal defendants' improper approval of the EIS for the Montaño bridge violated the National Environmental Policy Act ("NEPA"), 42 USC §4332 *et seq.* NEPA provides in pertinent part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall --
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --
>
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii)alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Section 4332 (emphasis added).

The requirements of NEPA apply only when the federal government's involvement in a project is sufficient to constitute "major federal action." Plaintiffs contend that the bridge project is a major federal action because of (1) the local defendants' eligibility for federal funding or (2) the FHWA's participation in and approval of the EIS. We disagree.

1. *Eligibility for Federal Funding*

Federal courts have not agreed on the amount of federal involvement necessary to trigger the applicability of NEPA. In *La Raza Unida v. Volpe*, 337 FSupp. 221 (N.D. Cal. 1971), *cert. denied* 409 US 890 (1972) (prematurely filed), *supplemented by* 57 FRD 94 (attorney's fees), *aff'd* 488 F2d 559 (9th Cir. 1973), *cert. denied*, 417 US 964 (1974), the Federal District Court for the Northern

District of California addressed the issue of whether "the federal regulations and statutes apply to a highway project upon location approval, construction approval, or some intermediate point when federal participation is assured[.]" *Id.* at 226. The court analyzed the problem by dividing highways into three categories: (1) "highways for which federal funds have been approved or are immediately sought"; (2) "state highways constructed without federal funds, and for which federal participation has never been sought"; and (3) "those projects that may eventually receive federal funds." *Id.* at 226-27. The court said that there is no question that highways in the first category are major federal actions, and highways in the second category clearly are not; the troublesome category is the third. The court concluded

that highways in the third category are major federal actions and require compliance with federal rules because "[a]ny project that seeks even the possible protection and assistance of the federal-government must fall within the statutes and regulations." *Id.* at 227.[1]

The United States District Court for the District of Connecticut recognized the

---

[1] In the case before us, the district court distinguished *La Raza* by noting that in *La Raza* the local government still had the **option** to receive federal funds, whereas here, the district court concluded that the local defendants have foreclosed that possibility and thus fall into *La Raza's* second category. We agree with the district court that an official foreclosure of all possibility of federal assistance will undoubtedly work to exempt a federal agency from NEPA requirements. However, here we find no concrete evidence that the local government was ever officially precluded from seeking federal assistance even though it expressed its intention not to seek federal funds. Thus, we analyze this case on the premise that the local government still had the possibility of receiving federal funds.

flaws in the approach taken in *La Raza*, and, instead of requiring all highways in *La Raza's* third category (state highways that may eventually receive federal funds) to submit to federal requirements, rejected *La Raza* and held that no highways in that category should be subject to federal requirements:

> Though recognizing the force of the argument developed in *La Raza* Unida, this Court concludes that while Congress no doubt has power to require NEPA compliance in such circumstances, the existing legislation simply does not do so.
>
> ....
>
> The contentions in [*La Raza*] are all sound, but with deference I do not understand how they establish that such an option [to apply for federal funding] on the part of a state constitutes the highway a "Federal action" within the meaning of NEPA. Solicitude for the environment cannot substitute for legislation. Congress has not applied NEPA to all highways that the states are **eligible** to fund with federal dollars.

> ....
> The State's option to use federal dollars, though open virtually until the concrete is poured, is nonetheless an option, and the State's choice should not be restricted simply because one alternative of the option (using state dollars) might result in less adequate assessment of environmental considerations. If the highway is not a federal action, then a state's decision to avoid federal involvement cannot have the paradoxical effect of establishing federal involvement.

Citizens for Balanced Environ. & Transp., Inc. v. Volpe, 376 FSupp 806, 812-13 (D. Conn.), *aff'd*, 503 F2d 601 (1974), *cert. denied*, 423 US 870 (1975) (emphasis in original).

We are persuaded by the analysis of *Citizens* and adopt its conclusions. Therefore, because the State of New Mexico, the City of Albuquerque, and the County of Bernalillo here (hereinafter collectively referred to as "the state") are only eligible for federal assistance, that

eligibility in itself is not sufficient to establish a major federal action requiring the FHWA to comply with the requirements of NEPA.

2. *Approval of the EIS*

Plaintiffs also argue that FHWA's assistance in and approval of the EIS is sufficient to make the bridge project a major federal action.[2] The district court

---

[2] In their reply brief, plaintiffs state that "an EIS itself is not a 'major federal action,'" and that they "are not making such an absurd claim." *See* Appellant's Reply Brief at 2. Rather, plaintiffs argue that "it is the funding and preparation assistance by the FHWA of the location study that preceded the EIS that triggers NEPA." *Id.* However, at oral argument plaintiffs argued that the location study is a component of the EIS. We cannot accept plaintiffs' implicit argument that the lesser (the location study) can impose higher standards (such as compliance with NEPA) than the greater (preparation of the EIS). Therefore, we construe plaintiffs' argument as stating that the EIS, which in this case includes the location study, is the major federal action.

rejected this argument on the following grounds:

> Clearly, the state in the instant case did not initially need any type of **federal** approval, assuming that they chose not to seek federal money, in order to proceed with the river crossings project. The fact that the state did voluntarily request a federal EIS, though they were not legally bound to do so, should not, without more, constrain the state to make the entire project federal. Unless the state is actually receiving or is planning to receive federal funding for a project, mere preparation and approval of an EIS is not "major federal action."

(Memorandum Opinion and Order at 9, June 9, 1987.) We agree with the district court and would only add that an EIS is what is required once a project is deemed to be a major federal action. **See** 42 USC §4332(C)(i). It would be anomalous indeed to say that in a case such as this, where there is no showing that the local defendants were involved in a sham

transaction to evade federal environmental requirements, that the preparation and approval of an EIS is a major federal action for which an EIS must be prepared and approved.

Plaintiffs also point to the fact that the federal government contributed nearly $59,000 of the $75,000 cost of the location study. Although $59,000 is indeed a large portion of that cost, it was incurred in connection with the preparation of the EIS and it is minuscule in comparison with the cost of the total bridge project.[3] *Cf. Citizens for Balanced Environ. & Transp., Inc. v. Volpe*, 376 FSupp 806, 810 (D. Conn.) ("The only other federal funding indicated is a sum less than $50,000 of federal highway planning and research funds that were used in

---

[3] The City of Albuquerque floated $10.3 million in bonds in 1983 and 1984 to finance the bridge project.

connection with the planning of the proposed road. The size of this expenditure and the totally preliminary purposes of the funds are too insignificant to render the proposed multi-million dollar highway a federal action.") (footnote omitted), *aff'd*, 503 F2d 301 (1974), *cert. denied*, 423 US 870 (1975).

For the foregoing reasons, we agree with the district court "that federal involvement with the bridge project[] was minimal, and, as a matter of law, did not rise to the level of 'major federal action' so as to bring the project within the purview of federal environmental laws." Memorandum Opinion and Order at 2, (June 9, 1987).

We draw guidance from *Sierra Club v. Hodel*, 848 F2d 1068 (10th Cir. 1988), as to the meaning of the phrase "major federal

action." In that case we analyzed whether and to what extent the Bureau of Land Management (the "BLM") could exercise control over a county's major road improvement project, and then we addressed whether such input or control by the BLM constituted "major federal action." First, we observed that the Council on Environmental Quality's regulations have defined major federal action to encompass not only actions by the federal government but also nonfederal actions "'with effects that may be major and which are potentially subject to Federal control and responsibility. 40 CFR 5 1508.18.'" *Id.* at 1089. However, we went on to state that:

> "[Tlhe distinguishing feature of 'federal' involvement is the ability to influence or control the outcome in material respects. The EIS process is supposed to inform the decision-maker. This presupposes he has judgment to exercise."

> ....
> The touchstone of major federal action, in the context of the case before us, is an agency's authority to influence significant nonfederal activity. This influence must be more than the power to give nonbinding advice to the nonfederal actor. . . . Rather, the federal agency must possess actual power to control the nonfederal activity.

Id. at 1089 (quoting W. Rodgers, *Environmental Law* 763 (1977) (citation omitted).

Given the decision of the state to proceed with the bridge project without federal assistance beyond the initial location study and EIS preparation, we conclude that there is no evidence that the federal government had the actual power to control this project. At most, it gave advice as to the location of the bridge. Thus, we do not here have any "major federal action."

SEGMENTATION

Plaintiffs argue that even if the

participation in, and approval of, the EIS alone is not enough to make the project federal, the bridge project was improperly "segmented" from the I-25/Los Angeles Interchange project, which is a major federal project subject to the requirements of NEPA. The district court rejected that argument, holding that "the evidence is undisputed that the projects are, at best, only peripherally related, and have not been improperly segmented from one another." (Memorandum Opinion and Order at 10, June 9, 1987.) We agree.

"As a general rule under NEPA, segmentation of highway projects is improper for purposes of preparing environmental impact statements." *Piedmont Heights Civic Club, Inc., v. Moreland*, 637 F2d 430, 439 (5th Cir. 1981). However, a local project closely related physically to a

federal project may be deemed independent for NEPA purposes after consideration of whether the proposed segment:

> (1) has logical termini, (2) has substantial independent utility, (3) does not foreclose the opportunity to consider alternatives, and (4) does not irretrievably commit federal funds for closely related projects.

Id.[4]

Plaintiffs argue on appeal that the district court erred in determining that they had failed to present any issues of material fact.[5] Specifically, they argue

---

[4] The district court considered only the first three factors enumerated in *Piedmont Heights*. (Memorandum Opinion and order at 10-11, June 9, 1987, citing 23 CFR §771.111(f); *Daly v. Volpe*, 514 F2d 1106 (9th Cir. 1975)). The appellants, however, do not argue that the district court failed to consider all relevant factors. Instead, they argue the district court erroneously found no issue of material fact with regards to the factors it did consider.

[5] The district court's findings are as follow:

that an affidavit submitted by one of their transportation consultants demonstrates that the eastern terminus of the bridge project, Edith Avenue, is not logical:

> 8. The . . . Wilson & Company [traffic] report addresses a Montaño Corridor with termini at Coors Road and Edith Boulevard. Figure 2 in that report indicates that 30% of the estimated year 2005 bridge traffic (or 5,070 vehicles per day) **will use the section of Montaño between Edith Boulevard and I-25.**
>
> 9. Since nearly a third of all bridge traffic will use montaño Bridge **east** of Edith Boulevard, this strongly suggests **that the logical eastern terminus for consideration of bridge**

> The Court finds that there is no material issue of fact as to whether such segmentation was proper, as [plaintiffs have] presented no evidence to the Court that the [I-25] project is in any way related to the Montaño bridge crossing, other than the inevitable relationship caused by the fact that some of the new frontage road traffic will undoubtedly use that route as a means of access to Montaño Road, and hence to the new bridge crossing.

Memorandum Opinion and Order at 11, (June 9, 1987).

> **traffic impacts and related improvements would be I-25**, which is the next major intersecting, regional route east of Edith Boulevard.
>
> 10. An I-25 terminus for Montaño Corridor improvements also has basis according to the Environmental Assessment (EA) for the I-25 Frontage Road improvements. Section "O" of the EA notes that among the assumptions behind the traffic forecasts used in the I-25 Frontage Road analysis was the following:
>
> ... a new Montaño corridor bridge and roadway (two-lane limited access facility) from Coors Road to Interstate 25 via Montaño Road/Montgomery Boulevard.

Affidavit of Harvey R. Joyner, Doc. 111 at ¶ 8-10) (emphasis added).

We do not read that evidence to say that Edith Boulevard is **not** a logical terminus. Rather, the affidavit, at most, merely asserts that the I-25 terminus would be **more** logical. That a terminus is the most logical is not mandated by the segmentation analysis -- that analysis requires only that a terminus be "logical."

Because plaintiffs point us to no evidence in the record indicating the Edith Boulevard is not a logical terminus, we agree with the district court that there is no question of material fact on that issue.

Even if a local project terminates at a point of juncture with a federally funded project, that would not preclude segmentation. "Congress has not purported to apply NEPA requirements to [e]very highway that connects with a federally-funded highway, and the fact that the connection here involves a three-mile overlap makes no difference." *Citizens for BalancedEnviron. & Transp.,Inc. v. Volpe*, 376 FSupp 806, 810 (D.Conn.), *aff'd*, 503 F2d 301 (1974), *cert. denied*, 423 US 870 (1975). Because all local projects must start and end somewhere, under plaintiffs' theory the entire highway network across the country

could be considered one project. Such an implication is obviously indefensible.

Because the criteria advanced in *Piedmont Heights* are satisfied here, and because plaintiffs have not demonstrated any issues of material fact or raised any other arguments that would demonstrate that the district court erroneously granted summary judgment in favor of defendants, we affirm the district court's holding that defendants did not improperly segment the bridge project from the I-25 project.

NATIONAL HISTORIC PRESERVATION ACT

Plaintiffs argue that the construction of the bridge requires compliance with section 106 of the National Historic Preservation Act ("NHPA"), 16 USC §470 *et seq*. The NHPA provides in pertinent part:

> The head of any Federal agency having direct or indirect jurisdiction over **a proposed Federal or federally assisted**

> **undertaking** in any State . . . shall, prior to the approval of **expenditure of any Federal funds** on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure or object that is included in the National Register.

16 USC §470f (emphasis added).

As we held above, the participation in and approval of the EIS in this case did not render the bridge project federal in nature. Moreover, the bridge project is not under the "direct or indirect jurisdiction" of the FHWA. Therefore, we cannot say that it is "a proposed Federal or federally assisted undertaking" requiring the FHWA's compliance with the requirements of the NHPA.[6] *See Lee v. Thornburgh*, 877 F2d 1053,

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[6] Plaintiffs refer to the 1986 version of the regulation promulgated to implement the NHPA, which defines "undertaking" as

> any Federal, federally assisted

1056 (D.C. Cir. 1989).

DEPARTMENT OF TRANSPORTATION ACT and EXECUTIVE ORDER 11990

Plaintiffs argue that the construction of the bridge requires compliance with §4(f) of the Department of Transportation Act ("DTA"), 49 USC App §303 and 23 USC §138, and Executive Order 11990. We

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> or federally licensed action, activity, or program or **the approval**, sanction, assistance, or support of any **non-Federal action**, activity or program. Undertakings include new and continuing projects and program activities . . . that are
> (3) carried out pursuant to a Federal lease, permit, license, certificate, **approval**, or other form of entitlement or permission.

36 CFR §800.2(c) (1986) (emphasis added in Appellants' Brief). Assuming, without deciding, that this quoted version of the regulation is the relevant and appropriate version controlling the present dispute, it cannot broaden the reach of the statute. Because the project is neither "federally assisted" nor under the "direct or indirect jurisdiction" of any "head of any Federal Agency," we need not address the definition of "undertaking" in this regulation.

disagree.

1. *Section 4(f)*

Section 4(f) provides that it is the national policy "that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." To that end, Section 4(f) permits the Secretary of Transportation to approve a transportation project only if

> (1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife or waterfowl refuge, or historic site resulting from such use.

49 USC App §303; *see* 23 USC §138. Plaintiffs argue that the Secretary's actions in this case constituted "approval" of the project such that compliance with §4(f)'s requirements is necessary.

We hold that, like the NEPA and the NHPA, §4(f) is only applicable to federal projects. *See Historic Preservation Guild of Bay View v. Burnley*, 896 F2d 985, 988 (6th Cir. 1989)(Section 4(f) is applicable only to federal projects, and not state projects); *see also Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F2d 75, 77 (4th Cir. 1989) (assuming, but not deciding, that Section 4(f) does not apply to a project that has received only federal planning funds); *cf.*, *Citizens to Preserve Overton Park v. Volpe*, 401 US 402, 411 (1971) (The language of §4(f) "is a plain and explicit bar to the use of **federal funds** for construction of highways through parks--only the most unusual situations are exempted."). Here, the district court properly explained that §4(f) does not apply because it "bars the use of **federal funds** to finance construction of highways

through parks, without all possible planning to minimize harm to the park." Memorandum opinion and Order at 13, June 9, 1987 (emphasis in original).

2. *Executive Order 11990*

Plaintiffs also argue that defendants have failed to comply with the requirements of Executive Order 11990. Specifically, appellants maintain that the defendants' action fall within the coverage of §1(a)(3) of Executive Order 11990. That section provides as follows:

> (a) Each agency shall provide leadership and shall take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the **agency's responsibilities** for . . . (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resource planning, regulating, and licensing activities.

Executive Order 11990, 42 Fed Reg 26961

(May 24, 1977) (emphasis added). The district court held that the order was inapplicable to the challenged actions because there had not been "any significant federal participation in the river crossings project." Memorandum Opinion and Order at 12, (June 9, 1987).

We agree with the district court that §1(a)(3) of Executive Order 11990 does not apply in this case. Plaintiffs argue that the preparation of the EIS constituted "land resource planning." While that may be true, Executive Order 11990 only imposes obligations upon an executive agency in carrying out its **responsibilities** for land use planning. Giving that term its normal usage,[7] the federal defendants were not

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[7] A "responsibility" is defined as "the state or fact of being...answerable or accountable, as for something within one's power or control." *Random House College Dictionary*, 1125 (1980).

"responsible" for the land use planning here at issue because they did not have any ability to exercise control over the project unless the state elected to seek federal funding for the project. Because the state declined to seek such funding, it was free to reject whatever federal location advice was offered in connection with the preparation of the EIS. Thus, the district court correctly concluded that the defendants' limited involvement in this project is insufficient federal action to trigger the requirements of Executive Order 11990.

CONCLUSIONS

For the foregoing reasons, we **AFFIRM** the decision of the district court in all respects.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VILLAGE OF LOS RANCHOS DE ALBUQUERQUE; RIO GRANDE VALLEY PRESERVATION SOCIETY,

Plaintiffs-Appellants,

and

ELBERT KING; JOAN MCGINNIS; VELMA WHIPPLE; THOMAS MONTOYA; PRISCILLA MONTOYA; JOHN TROTTER; KIT SARGENT,

Plaintiffs,

v. No. 87-2657

R.H. BARNHART, Administrator of the Federal Highway Administration; ELIZABETH DOLE, Secretary of the Department of Transportation; PETER A. LOMBARD, Environmental Protection Specialist for the Federal Highway Administration; DANIEL DAKE, Director, Office of Planning and Programming Development of the Federal Highway Administration; DEWEY LONSBERRY, Federal Highway Division, Administrator,

Defendants-Appellees,

CITY OF ALBUQUERQUE; THE COUNTY OF BERNALILLO,

Defendants-Intervenors-Appellees.

ORDER

Filed August 22, 1990

Before LOGAN, MOORE, and
EBEL, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing in the captioned case.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court.

s/
ROBERT L. HOECKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

VILLAGE OF LOS RANCHOS DE ALBUQUERQUE, et al.,

Plaintiffs,

v. Civil No. 84-1273-JB

R.A. BARNHART, Administrator of the Federal Highway Administration, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the federal Defendants' motion for summary judgment. Having reviewed the pleadings, the evidence of record and the relevant law, the Court finds that the motion is well taken and will be granted.

This action involves a long-standing dispute over construction of two bridges in the North Valley area of Albuquerque, New Mexico, one north of El Pueblo Road ["Paseo del Norte"] and another further south, at

Montano Road. Plaintiff Village of Los Ranchos de Albuquerque ["the Village'] opposes the construction of these bridges, charging that the increased traffic will harm the rural character of the Village, threaten historical landmarks, and damage the river bosque wetlands. The Village alleges that the federal Defendants failed adequately to consider all environmental and other factors before approving and Environmental Impact Statement ["EIS"] for the project, in violation of federal environmental statutes.[1] Thus, Plaintiffs contend that they are entitled to declaratory and injunctive relief with respect to any further federal involvement

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[1] The Village claims violations of the National Environmental Policy Act ["NEPA"], 42 USC §4332 *et seq.*, the National Historic Preservation Act ["NHPA"], 16 USC §§470-470W-6, the Department of Transportation Act of 1966, 49 USC §303, and Executive Order ["E.O."] 11990 regarding the preservation of the wetlands.

in the North Valley river crossings project. However, the Court finds that federal involvement with the bridge projects was minimal, and, as a matter of law, did not rise to the level of "major federal action" so as to bring the project within the purview of federal environmental laws. Thus, Plaintiffs' claims must fail and summary judgment in favor of the federal Defendants is warranted.

Facts

Plaintiffs filed their Complaint in this action on August 30, 1984, seeking declaratory and injunctive relief from the federal Defendants, in the form of (1) a Court order declaring that federal approval of an EIS for the river crossings project violated federal environmental laws; and (2) an injunction against all further federal participation in the river

crossings project. The New Mexico State Highway Commission and Department, and Bernalillo County, filed motions to intervene as Defendants which subsequently were granted. On October 11, 1985, the Village entered into a settlement agreement with the state Defendants, whereby the Village agreed to bring no further legal actions against any Defendant, federal or state, with respect to the proposed Paseo del Norte crossing, and further agreed to dismissal of all of its river-crossing project claims against the state Defendants. Thus, the only remaining claims in this lawsuit are against the federal Defendants, with respect to the proposed Montano crossing.

The North Valley river crossings project is a proposal for construction of two bridges across the Rio Grande River, one at Paseo del Norte just south of an

existing crossing at Corrales Road, and another further south at Montano Road. Construction on the Paseo del Norte has begun as of this writing, while the Montano Bridge is still in the planning stage. Both bridges involve substantial right-of-way acquisitions within the Village, a rural community northwest of Albuquerque. Further, the project involves widening of Village roads and addition of new roods to handle the increased bridge traffic, with resulting effects of increased noise, etc., on neighboring Village landowners. The bridge at Paseo del Norte will be a four-lane crossing with an option for later expansion to six lanes, while the Montano crossing is proposed to be two lanes.

While few residential homeowners would react favorably to the prospect of having a major arterial traffic route built practically in their backyards, the

citizens of the Village are particularly concerned about the impact of the new bridges on the rural quality of their neighborhood, various sites of historical interest in that area, and the effects of the project on the river bosque wetlands. The Village has thus brought suit under various federal environmental protection statutes, arguing that, in approving the bridge projects, the federal government is taking action which will adversely affect the environment, without adequate study and planning as required by law.

The central issue in this motion is whether or not the federal government's involvement in the river crossings project is sufficiently major to trigger the applicable statutes. Therefore, the extent of that involvement must here be set forth in some detail.

Federal involvement in the river

crossings project was initiated by a January 1979 decision of the Urban Transportation Planning Policy Board ["UTPPB"] of the Middle Rio Grande Council of Governments to seek a location-environmental study of the project.[2] This

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[2] According to the Affidavit of Thomas B. Hoover, Defendants' Exhibit 10, ¶ 8, in support of this motion:

> Factors which led the UTPPB to make the decision to conduct a location-environmental study were: 1) The State Action Plan mandates preparation of an EIS (Environmental Impact Statement) for all major State Highway Department projects, whether or not the project will be federally funded; any extra work required to meet federal requirements would be minimal; 2) desire to preserve project eligibility for any additional funding if it became available under new federal highway legislation and if the State and local agencies elected to apply for it; 3) public concern for the need to address the social, economic, and environmental effects of new river crossings; 4) Section 404 permits would be required from the U.S. Army Corps of Engineers

request was presented to the Federal Highway Administration ["FHWA"], where, on February 5, 1979, the Division office in Santa Fe, New Mexico, authorized preliminary engineering work in preparation of the environmental study for the river crossings project. The authorization form for the project, Defendants' Exhibit 8A, estimated the cost of the location-environmental study at $75,000.00, and authorized federal financial assistance for part of these costs, in the amount of $58,972.50

In addition to provision of funding, the federal government took an active role in the preparation of the EIS. Without

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before construction of the bridges could commence, thus federal National Environmental Policy Act compliance relating to the Section 404 permit applications would be required in any event.

going in to exhaustive detail as the process is set forth in Defendants' Answers to Interrogatories, submitted as Plaintiff's Exhibit 1, it is safe to say that the actual preparation of the EIS required fairly extensive federal assistance form approving agencies and individual FHWA personnel. The process is lengthy and, as the actual sufficiency of the EIS itself is not at this time before the Court, the Court will not here reiterate those procedures. A Final Environmental Impact Statement ["FEIS"] for the river crossings project was approved by Peter Lombard, Director of the Office of Planning and Program Development in the Region 6 Office of the FHWA, on September 16, 1983.

After approval of the FEIS, the City of Albuquerque programmed $4.2 million of 1983 general obligation bond money for the

Montano crossing, and an additional $6.1 million was appropriated for the project from the 1985 bond election.

According to the affidavit/deposition testimony of Joseph Martin, Director of New Mexico Department of Transportation, Harry E. Kinney, former Mayor of Albuquerque, and Kenneth E. Bower, Jr., Director of Technical Support for the New Mexico State Highway Department, federal funding has not been and will not be requested for any part of the Montano or the Paseo del Norte river crossings. Thus, as of the date of FEIS approval by the FHWA, federal involvement in the river crossings project came to an end, as far as any financial assistance was concerned.

Plaintiff's Standing to Sue and Ripeness

The Court must first consider the jurisdictional issues raised by the federal

Defendants, namely that the Village lacks standing to sue the FHWA, and that this case is not yet ripe for review. The Court rejects both of these contentions.

First, with respect to the standing issue, the Village must allege (1) "a distinct and palpable injury to itself," or in the case of an organization, to its members, and (2) that "the asserted injury was the consequence of the Defendants' actions, or that prospective relief will remove the harm." *Warth v. Seldin*, 422 US 490, 501, 505 (1975); *Baker v. Carr*, 369 US 186 (1962); *Glover River Organization v. United States Department of the Interior*, 675 F2d 251 (10th Cir. 1982). The Village meets each of these criteria. First, the Village and its members have presented evidence from which the Court may reasonably conclude that they will suffer "distinct and palpable injury"

if the Montanc bridge is built as planned. Such injury would take the form of increased traffic, noise, and a possible decrease int he value of the Village residents' land, as well as, in some cases, condemnation of all or portions of such land. Second, if the Court were to grant all relief requested by the Village, *i.e.*, (1) to declare that federal involvement in the project is "major," and (2) to enjoin further federal involvement in the project pending compliance with federal environmental laws, such relief would redress the injury claimed. Work on the bridge could not then proceed absent compliance with federal law, should the Court find such law to be applicable.

Second, with respect to the issue of ripeness, Defendants ague that the actions of the FHWA in respect to the bridge

crossings project are not final agency actions, or even if they are such final actions, they are not ripe for review. The real thrust of Defendants' argument is that the federal Defendants retain no power to affect the crossing project in any way, since the EIS was not required by law, and no further federal assistance was requested by the state. The Court finds, however, as a threshold matter, that it has jurisdiction to determine **whether** the federal Defendants' actions were of sufficient magnitude to subject them to the federal environmental laws alleged here, and thus to the relief requested by the Village. An already-accomplished action such as allegedly improper preparation and approval of an EIS is clearly ripe for review, in accordance with applicable standards; *See Rocky Mountain Oil & Gas Association v.*

Watt, 696 F2d 734, 741 (10th Cir. 1982).

"Major Federal Action"

The Village claims that the federal Defendants' allegedly improper approval of the EIS for the bridge project violated the National Environmental Policy Act [NEPA], 42 USC §4332 *et seq.* Section 4332 provides, in part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall -
>
> * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse

> environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Whether this statute even applies to the bridge project hinges, in this case, on the question of whether the federal government's involvement in this project was sufficient to constitute "major federal action."

The question of what constitutes "major federal action" has received varying interpretations by the courts, but few cases have found such action to exist without the presence of at least some

federal funding of the project in question. In the instant case, Defendants have presented evidence, as previously set forth in the factual portion of this opinion, that no federal funds have been sought, nor will any such funding be sought, for the river crossings project. The Village's mere argument that the state has not "officially" shut the door on federal funding, and thus theoretically retains that option, is not sufficient to overcome the federal Defendants' evidence to the contrary. A motion for summary judgment properly may be granted only in cases where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The movant bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 54 USLW 4775,

4777 (June 25, 1986); *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 516 F2d 33, 36 (10th Cir. 1975). In ruling upon a motion for summary judgment the Court must view the record in the light most favorable to the party opposing the motion and must consider factual inferences in the light most favorable to the existence of triable issues. *Exnicious v. United States*, 563 F2d 418 (10th Cir. 1977). The burden on a defendant moving for summary judgment may be discharged by offering evidence that negates an element of the plaintiff's claim or by showing hat there is an absence of evidence to support the nonmoving party's case. *Celotex*, 54 USLW at 4777-78. Should the Plaintiff then fail to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of

proof at trial, summary judgment in favor of the moving party is mandated. *Id.* at 4777.

Thus, since the Court finds that no issue of material fact remains as to future federal funding, the only issue to be decided on this motion for summary judgment is a question of law: whether the federal government's financial and technical participation in and approval of the EIS for the river crossings project amounted to "major federal action."

In support of its argument that approval of an EIS can amount to "major federal action," the Village directs this Court's attention to several Tenth Circuit cases dealing with similar issues: *Scenic Rivers Association of Oklahoma v. Lynn*, 520 F2d 240 (10th Cir. 1975), *rev'd on other grounds*, 426 US

776 (1976), and *Davis v. Morton*, 469 F2d 593 (10th Cir. 1972). *Davis* held that the federal government's granting of a lease on Indian land was major federal action requiring subsequent preparations of an EIS for proposed projects on the land. The *Scenic Rivers* case held that federal approval of a developer's filing under the Interstate Land Sales Act constituted major federal action, requiring that an EIS be prepared.

Both of the above-cited cases dealt with the issue of when a project was sufficiently federal to **require** preparation of an EIS, but those courts did not address the question of whether **approval** of the EIS **itself**, regardless of whether or not preparation of an EIS was initially required by law, constitutes major federal action. Clearly, the state in the instant

case did not initially need any type of **federal** approval, assuming that they chose not to seek federal money, in order to proceed with the river crossings project. The fact that the state did voluntarily request a federal EIS, though they were not legally bound to do so, should not, without more, constrain the state to make the entire project federal. Unless the state is actually receiving or is planning to receive federal funding for a project, mere preparation and approval of an EIS is not "major federal action." *See Citizens for Balanced Environment & Transportation, Inc. v., Volpe*, 376 FSupp 806 (D. Conn.,), *aff'd*, 503 F2d 601 (2d Cir. 1974), *cert. denied*, 423 US 870 (1975). The Village cites a number of cases *contra, see La Raza Unida of Southern Alameda County v. Volpe*, 337 FSupp 221, 226, 227 *aff'd*, 488 F.2d 559 (9th

cir. 1973), *cert. denied*, 409 US 890 (1972); *San Antonio Conservation Society v. Texas Highway Department*, 446 F2d 1013, 1027 (5th Cir. 1971), *cert. denied*, 406 US 933 (1972); *Scottsdale Mall v. State of Indiana*, 549 F2d 484 (7th Cir. 1977), *cert. denied*, 434 US 1008 (1978) (and cases cited therein at 488); *City of Boston v. Volpe*, 464 F2d 254, 258-59 (1st Cir. 1972).

The cases which hold that mere preparation of an EIS is a major federal action reason generally that the option to receive federal funds is still available to the state, through preparation of the EIS, and the state should not therefore be allowed to "duck" further federal environmental regulation merely by asserting that they are not actually receiving federal funds. However, where, as here, uncontradicted evidence shows that

a state will not later seek federal funding for a project,[3] it seems inconsistent with basic princip[les] of federalism to nevertheless require the state to label the project as federal. It is evident from the statutory language, "major federal action," that Congress did not intend for purely locally-funded, locally-built projects to come within the purview of federal environmental laws. Courts have recognized that purely local projects, no matter how great their potential impact on the environment, do not fall within the purview of federal law. *See Civic Improvement Committee v. Volpe*, 459 F2d 957 (4th Cir. 1972); *Bradford*

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[3] The Village argues that the state has not "officially" foreclosed the option for federal funding, and thus theoretically may still seek federal money for the project. However, for purposes of this motion, the Court relies on evidence voluntarily presented by Defendants, and uncontradicted by Plaintiffs, that such funds will not be sought.

Township v. Illinois State Toll Highway Authority, 463 F2d 537, 540 (7th Cir.), *cert. denied*, 409 US 1047 (1972). It is reasonable to conclude that purely locally-funded and operated projects, such as the North Valley river crossings project, do not become "major federal action" by reason of federal involvement limited to preparing and approving an EIS for the project.

Segmentation

The Village further argues that, even if the preparation of the EIS alone, as the Court has held, is not enough to make the entire project federal, the river crossings project was nevertheless improperly "segmented" from the I-25/Los Angeles Interchange project, which is a federal funded project. Thus, the Village argues that each project comprises one whole, "major federal action." The Court rejects

this argument, as the evidence is undisputed that the projects are, at best, only peripherally related, and have not been improperly segmented from one another.

Case law, incorporated in FHWA regulations at 23 CFR §771.111(f), has developed the following factors for determining the proper "scope" of a project:

(1) connects logical termini and is of sufficient length to address environmental matters on a broad scope;

(2) has independent utility or independent significance; and

(3) does not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

See, e.g., Bennett v. Taylor, 505 F Supp 800, 808 (M.D. La. 1980); *Daly v. Volpe*, 514 F2d 1106 (9th Cir., 1975).

Under the regulations, a project which

meets these criteria is suitable in scope for a separate evaluation. Such a separate EIS has been prepared for the Los Angeles/I-25 project. The Court finds that there is no material issue of fact as to whether such segmentation was proper, as the Village has presented no evidence to this Court that the project is in any way related to the Montano bridge crossing, other than the inevitable relationship caused by the fact that some of the new frontage road traffic will undoubtedly use that route as a means of access to Montano Road, and hence to the new bridge crossing. But this factor alone does not mean that the projects were improperly "segmented" by the preparation of a separate EIS for each one. The Los Angeles/I-25 project meets the criteria for being suitable in scope

for a separate EIS.[4] The Village has presented no evidence contrary to this analysis, and the Court finds that he federal-aid frontage road project is not impermissibly segmented from the locally-

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[4] Concerning the frontage roads project as a whole, the first criterion is not an issue, inasmuch as only safety and operational improvements to an existing facility are involved. The Los Angeles and Montgomery/Montano Interchanges tie into presently existing facilities. They thus have logical termini. The length of the project, from Menaul north some 7.5 miles to Tramway, also complies with the first criterion as it is sufficient to address environmental matter on a broad scope. The project likewise complies with the second criterion; the safety and operational improvements to I-25 have independent utility in that they are justifiable without reference to any other project. Finally, the I-25 project meets the third criterion of the regulations. The sixteen alternatives considered in the EIS for the river crossings indicate that the frontage roads project did not restrict consideration of alternatives for the river crossings. Furthermore, federal approval of the I-25 project was given before FHWA approved the EIS on the river crossings, which suggests that the river crossing projects did not limit federal consideration of alternatives to the I-25 improvements.

funded North valley river crossing projects.

The National Historic Preservation Act

The Village further alleges that Defendants have not complied with the National Historic Preservation Act, 16 USC §§420-470W-6 [NHPA], and that, regardless of this Court's decision regarding Plaintiffs' claims under the NEPA, the NHPA still applies to this case as it requires a lower threshold of federal participation than does the NEPA. The Court does not agree.

The NHPA, 16 USC §470t, provides in pertinent part:

> The head of any Federal Agency having direct or indirect jurisdiction over **a proposed Federal or federally undertaking** in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any

> license ... take into account the effect of the undertaking on any district, site, building, structure or object that is included in the National Register. (Emphasis added.)

This Court has already held that the river crossings project is not federally assisted, nor is the project rendered "federal" in character by the federal government's mere participation in and approval of an EIS for the project. Thus, as no "Federal" or "federally assisted" undertaking is involved in this action, the NHPA does not apply.

Section 4f of the Department of Transportation Act of 1966, and E.O. 11990

The Village's argument that §4(f), 49 USC §303, and Executive Order 11990 apply to this action fails for the same reason: lack of any significant federal participation in the river crossings project. Section 4(f) bars the use of

federal funds to finance construction of highways through parks, without all possible planning to minimize harm to the park. *See Citizens to Preserve Overton Park v. Volpe*, 401 US 402, 406 (1971). Similarly, E.O. 11990 applies to federal agencies "undertaking or providing assistance for new construction in wetlands ..." (Emphasis added.) As this Court has already stated, the river crossings project is not a federal undertaking nor is it federally assisted. Therefore, §4(f) and E.O. 11990 have no application to this case.

As the Court finds no significant federal participation in this action which would require compliance with the federal environmental laws asserted by the Village as grounds for this lawsuit, it follows that summary judgment in favor of the federal Defendants is proper.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that the federal Defendants' motion for summary judgment be, and the same hereby is, granted.

DATED this 9th day of June, 1987.

s/ Juan G. Burciaga

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

VILLAGE OF LOS RANCHOS DE ALBUQUERQUE, et al.,

Plaintiffs,

v. Civil No. 84-1273-JB

R.A. BARNHART, Administrator of the Federal Highway Administration, et al.,

Defendants.

J U D G M E N T

THIS MATTER comes before the Court on the federal Defendants' motion for summary judgment, and the Court having entered its Memorandum Opinion and Order herewith granting the motion;

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs VILLAGE OF LOS RANCHOS DE ALBUQUERQUE, RIO GRANDE VALLEY PRESERVATION SOCIETY, ELBERT KING, JOAN McGINNIS, VELMA WHIPPLE, THOMAS MONTOYA, PRISCILLA MONTOYA,

JOHN TROTTER and KIT SARGENT take nothing by their Complaint against federal Defendants R.H. BARNHART, ELIZABETH DOLE, PETER A. LOMBARD, DANIEL DAKE and DEWEY LONSBERRY.

DATED this 9th day of June, 1987.

s/Juan G. Burciaga
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

VILLAGE OF LOS RANCHOS DE ALBUQUERQUE, et al.,

Plaintiffs,

v. Civil No. 84-1273-JB

R.A. BARNHART, Administrator of the Federal Highway Administration, et al.,

Defendants.

ORDER

Because of the Court's decision granting the Federal Defendant's Motion for Summary Judgment herein, there are no claims remaining against the Defendant Intervenor, City of Albuquerque and Defendant Intervenor, County of Bernalillo, and the Court being fully advised in the premises,

IT IS THEREFORE ORDERED that Defendant Intervenor City of Albuquerque and Defendant Intervenor County of Bernalillo

are hereby dismissed as Defendants in the above entitled action on the same grounds as stated by the Court for dismissal of Plaintiff's complaint against the Federal Defendants.

DATED this 6th day of October, 1987.

s/Juan G. Burciaga
DISTRICT COURT JUDGE

Approved:

s/
Edward R. Pearson
Assistant City Attorney
Attorney for Defendant
Intervenor, City of
Albuquerque

s/
Alice G. Hector
Attorney for Plaintiffs

s/
J. Edward Hollington
Attorney for Defendant
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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

Village of Los Ranchos de Albuquerque, et al.,

Plaintiffs,

vs. NO. CIV 88-1032JC

Lieutenant General Henry J. Hatch, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER is now before the Court on the defendant City of Albuquerque's Motion to Dismiss for Failure to State a Claim, filed March 13, 1989; the defendant City's Motion for Protective Order, filed March 13, 1989; the federal defendants' Motion for Protective Order, filed March 17, 1989; and the defendant City's Motion to Dismiss for Lack of Standing and Estoppel, filed March 23, 1989. Having reviewed the memoranda of the parties and the applicable case law, and being otherwise fully advised

in the premises, the Court finds that the first Motion to Dismiss is not well-taken and will be denied. The second Motion to Dismiss is well-taken and will be granted. The City's Motion for Protective Order is moot, and the federal defendants' Motion for Protective Order is well-taken in part and will be granted in part. The Court's reasoning is set forth below.

PART I - MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

On August 29, 1988 the plaintiffs commenced this action alleging that the Army Corps of Engineers, the U.S. Fish and Wildlife Service and the City of Albuquerque violated the National Environmental Policy At (NEPA), 42 USC §4321 *et seq.*, §404 of the Clean Water Act, 33 USC §1341 and the Fish and Wildlife Coordination Act, 16 USC §662, in granting Army Permit No. NM-OYT-0458 to the City of

Albuquerque for construction of one aspect of the Montaño Bridge and Corridor (Montaño Project).

The sole basis for the City defendant's Motion to Dismiss for Failure to State a Claim is that the plaintiffs' reliance on 28 USC §1331 and §1361 as jurisdictional basis is misplaced. The City suggests that the current action can be sustained only by a petition for judicial review under the Administrative Procedures Act (APA), 5 USC §706(2)(A).

A review of the applicable case law suggests that the defendant's position is not well-taken, and that the plaintiffs have properly pled jurisdiction under 28 USC §1331 and 5 USC §706. In *Califano v. Sanders*, 430 US 99 (1977), the Supreme Court indicated that the 1976 modifications to §1331 jurisdiction conferred "jurisdiction

on the federal courts to review agency action, regardless of whether the APA of its own force served as a jurisdictional predicate." This Court is guided by *Califano* and further finds that the APA specifically contemplated U.S. District Court review of agency actions. Title 5 USC §702, entitled "Right to Review" specifically states that

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statu[t]e, is entitled to judicial review thereof.

This jurisdictional axiom was also recognized in *Friends of the Earth v. Hintz*, 800 F2d 822 (9th Cir. 1986), a case presented to this Court by the defendants. There the circuit court found that the plaintiff's suit seeking judicial review of an Army Corps of Engineers issuance of a permit under §404 of the Clean Water Act, 33 USC

§1344, was properly based on 28 USC §1331 as well as 33 USC §1365. *Id.* at 827.

The Court finds that paragraph 2 of the Complaint properly alleges §1331 jurisdiction, and that paragraph 3 of the Complaint properly alleges review under the APA at §706. Both paragraphs are incorporated by reference into each of the claims for relief; therefore, jurisdiction is properly based.

The allegation of §1361 jurisdiction as it appears in the Complaint is redundant. In the plaintiffs' Response to Motion to Dismiss, filed April 5, 1989, plaintiffs explain that they are seeking mandamus relief under 28 USC §1361 based on the duty of the Fish and Wildlife Service to recommend adequate mitigation. Plaintiffs seek an order compelling the Fish and Wildlife Service to recommend

adequate mitigation as pertains to the Montaño Project. However, a review of §706 indicates that the relief requested may properly be granted within the framework of the APA. Section 706(1) provides that the reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." Plaintiffs' claim of jurisdiction pursuant to §1361 will therefore be relegated to the dust bin of legal excess.

PART II - DEFENDANT'S MOTION TO DISMISS FOR LACK OF STANDING AND ESTOPPEL

In their motion dated March 23, 1989 the City defendants have moved to dismiss on grounds that the plaintiffs lack standing to assert the claims alleged in the Complaint against the City. The basis for the defendants' claim is that the action in question is the federal agency's

granting of the §404 permit and that the plaintiffs' claim is against the sufficiency of the permit as opposed to any City action. The City asserts that there is no right of action created by any federal statute which would allow the plaintiff to proceed against it. Finally, the City urges that even if proof of a federal permitting violation occurred, such a violation would not form a basis for an injunction against a wholly non-federal project which is in fact the City's exercise of its police power. The City concedes that it has relied on the validity of the permit, but it also states that its actions to date, specifically those related to the widening of Montaño Road, would have occurred regardless of the issuance of the permit, and are at any rate within the legal scope of the City's authority.

On the other hand, the plaintiffs

argue that NEPA covers all proposed actions and impacts of a project whether those actions are taken by federal or non-federal actors. The plaintiffs urge that all impacts of a project, past, present and reasonably foreseeable are covered by the NEPA umbrella under 40 CFR §1508.7. Thus, plaintiffs argue, the City is properly named as a defendant since its actions are a reasonably foreseeable consequence of the issuance of the §404 permit. The plaintiffs further allege that the §404 permit enabled the City to pursue the construction of the Montaño Corridor and Bridge, and as such the non-federal action is completely linked to and dependent on the Corps' §404 permit. On that basis, the plaintiffs argue that an injunction against the City would be properly and correctly granted by this Court. This reasoning is explained below.

As the defendants correctly point out, standing to sue has traditionally been accorded those "injured in fact" or "adversely affected" or "aggrieved" by actions of the defendants. *U.S. v. SCRAP*, 412 US 669 (1973). In *Allen v. Wright*, 468 US 737 (1984), the Supreme Court stated that the "injury" must be fairly traceable to the challenged action, and relief from the injury must be "likely" to follow from a favorable decision. An association has standing to sue if individual members of the association have a cognizable personal interest at stake and if individual members have been "injured in fact." *Sierra Club v. Morton*, 405 US 727 (1972). The Tenth Circuit has held that associations seeking review only need allege facts showing that individual members are adversely affected as individuals. *Citizens Concerned for Separation of*

Church and State v. City and County of Denver, 628 F2d 1289 (10th Cir. 1980); *Mountain States Legal Foundation v. Costle*, 630 F2d 754 (10th Cir. 1980). Finally, in *Save the Bay v. United States Corps of Engineers*, 610 F2d 322 (5th Cir. 1980), the court ruled that aesthetic and environmental injury to members of an association who reside in the geographic area of concern is sufficient to grant standing.

This Court now finds that plaintiffs have properly alleged facts in their Complaint sufficient to grant standing to the Village, the Rio Grande Valley Preservation Society, and the individual plaintiffs to bring this cause against the federal defendants. The plaintiffs will be adversely affected by the Montaño project and thus all have a personal stake fairly traceable to and causally connected to the

challenged conduct of the federal defendants.

The Village of Los Ranchos meets the standing test because residents of the Village live in or near the Montaño Corridor and use the Bosque and thus will be affected by the numerous impacts of the Montaño Bridge and Corridor. Individual plaintiffs have standing because they live in or near the proposed Montaño Corridor and use the Bosque and thus will be affected by the environmental impacts. The Rio Grande Valley Preservation Society has standing because many individual members of the organization live in or near the proposed Montaño Corridor and use the Bosque and thus will be affected by the environmental impacts associated with the project. Mr. Arnold Sargeant, a resident of the Bosque area, testified without objection at the temporary restraining

order hearing before this Court on March 30, 1989 that individual members of the Rio Grande Valley Preservation Society use and enjoy the Bosque on a regular basis. He also testified that one of the purposes of the organization is to protect the Bosque. These interests give the Rio Grande Valley Preservation Society organization standing in this case.

Having clearly established that the plaintiffs have standing to sue, the question before the Court is whether that standing extends to the claims against the City. It is this Court's opinion that it does not. In reaching this decision, the Court has relied heavily on two separate themes. First, the actor which has caused or will cause the alleged injury is the federal agency through the granting of the §404 permit. The City has in no manner been involved in the permitting process but

for its initial request of the permit. Thus, it cannot fairly be said that the City is an actor whose conduct is causally related to the injury claimed by the plaintiff.

Secondly, however, the Court specifically notes that in the event that an injunction should prove warranted, the Court's grant of said injunction would have the same effect on the City as a non-party as it would on the City and federal defendants as parties. This reasoning is explained below.

In urging that standing in fact exists, the plaintiffs rely in considerable part on the case of *Fritiofson v. Alexander*, 772 F2d 1225 (5th Cir. 1985). There the plaintiffs sued a private developer, along with federal officials, to prevent construction of a waterfront housing

development before preparation of a proper environmental impact statement. The Fifth Circuit Court of Appeals upheld an injunction against the developer when it found that the Corps had improperly declined to study related cumulative impacts of the development. (The Fifth Circuit only affirmed the district court's injunction insofar as it prohibited the private developer from performing additional work on the land in question **which was within the jurisdiction of the Corps.** [()]The court did not enjoin development outside of the permit area). Though somewhat unclear, it appears that the plaintiffs rely on the implicit assumption in *Fritiofson* that the court would not have enjoined the defendant developer if the plaintiff lacked standing to sue that party.

This Court deduces from *Fritiofson* that in a NEPA claim where a private developer proposes development on land under the jurisdiction of a federal agency for permitting purposes, the developer may properly be enjoined if there is a finding that the EIS or EA relied upon as a basis for the permit is legally deficient.

It is also well established that a court order granting injunction "is binding upon parties to an action...and upon those persons in active concert *or* participation with them who receive actual notice of the order." *U.S. v. Hall*, 42 F2d 261 (emphasis added). Furthermore, a court may bind non-parties to terms of an injunction to preserve its ability to render a judgment in a case over which it has jurisdiction. *Vuition et Fils S.A. v. Carousel Handbags*, 592 F2d 126 (2nd Cir. 1979). Having considered the

rulings in *Fritiofson*, *Hall* and *Carousel Handbags*, the Court now determines that dismissal of the City of Albuquerque will not substantially prejudice the plaintiffs' rights under the NEPA. While it is admittedly true that the plaintiffs will not be able to raise a claim against the City directly, it is also true that to date they have not established a basis for doing so. On the other hand, while the City defendants will be excused from formal pleading, their actions in regard to the project will still be significantly dependent upon the validity of the permit. It is this Court's belief that this approach to the litigation focuses the considerable light shed by the adversary process on the core issue: Is the §404 permit valid?

Having reached this conclusion, the

Court will grant the City's Motion to Dismiss for Lack of Standing. The issue of estoppel need not be reached. The Court will also deny the City's Motion for Protective Order as moot and order that the City defendants need not respond to plaintiffs' propounded interrogatories.

PART III - FEDERAL DEFENDANTS' MOTION FOR PROTECTIVE ORDER

The federal defendants base their motion on the assumption that any action seeking judicial review of the Corps of Engineers issuance of the §404 permit must be determined solely on the complete administrative record. Therefore, any additional discovery would not and could not lead to competent admissible evidence.

The general rule is that judicial review of agency action is limited to a review of the administrative record. *Florida Power & Light Co. v. Lorion*, 470 US 729 (1985),

Camp v. Pitts, 411 US 138 (1973). In addition, the courts have clearly indicated that in actions brought requesting relief under APA §706(2)(A) - which seek to set aside agency findings as arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law - the record available to the court is limited to the record of proceedings available to the administrative agency. *Citizens to Protect Overton Park v. Volpe*, 401 US 402 (1971), *Friends of the Earth v. Hintz*, 800 F2d 822 (9th Cir. 1986), *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F2d 897 (5th Cir. 1983) (holding that the judicial review of agency determinations conducted under §706(2)(B) and (C) is also limited to the administrative agency record).

The courts have clearly indicated that §706(2)(E) review is also limited to the

administrative agency record. *Roberts v. Morton*, 549 F2d 158 (10th Cir. 1977) and *Fishback v. U.S.*, 519 FSupp 190 (D.N.M. 1981).

Plaintiffs' acknowledge that of their five claims for relief, the third and fourth claims, which challenge the actions and decision of the Corps in regard to the §404 permitting process, are clearly within the scope of APA §706(2)(A) review. Thus, there can be no dispute that this Court should only review those claims based on the complete administrative agency record. Given this scenario, the Court will only supplement the administrative agency record if it appears that "there is such a failure to explain administrative action as to frustrate effective judicial review." *C.F.I. Steel Corp. v. Economic Development Administration*, 624 F2d 136 (10th Cir. 1980).

Plaintiffs urge that there exist

several exceptions to the general rule limiting the reviewing court to the administrative record, and that those exceptions apply to the first, second and fifth claims for relief. One such exception encompasses claims brought pursuant to the procedural requirements of NEPA. On that basis, the plaintiffs urge that additional discovery is appropriate on its first and second claims for relief which are premised on NEPA, 42 USC §4321, *et seq.* The Tenth Circuit has had occasion to clarify this issue in a context substantially similar to the current cause. In *National Helium Corp. v. Morton*, 486 F2d 995 (10th Cir. 1973), the court was presented with a challenge to the sufficiency of an EIS which the Secretary of the Interior had used as a basis for the decision to terminate certain helium purchase

contracts. This appeal[1] was based on the district court's ruling that the department had failed to comply with the mandate of NEPA because the EIS was essentially lacking in depth.

For the purposes of this case, the relevant portion of the Tenth Circuit's opinion is found in Part II beginning at page 1001. There, the court illustrates and explains that the record available to the reviewing district court is dependent on the type of action being reviewed. When called upon to assess the adequacy of an

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[1] The Tenth Circuit had ruled on three previous appeals in the same cause of action. In the first appeal, 455 F2d 650 (10th Cir. 1971), the court upheld the district court's ruling that contracts entered into pursuant to the Helium Act could not be terminated without the filing by the Interior Department of an Environmental Impact Statement in accordance with 42 USC §4321, *et seq.* The court held specifically that the Interior Department was required to comply with the provisions of the NEPA.

impact statement, the Tenth Circuit held that a court was not reviewing agency action within the meaning of the APA. The court acknowledged that a review of agency action *per se* would be forbidden by the Supreme Court's ruling in *Citizens to Preserve Overton Park v. Volpe*, 401 US 402 (1971), but found that a review of the adequacy of the EIS was in the realm of a review of a NEPA procedural requirement which was a prerequisite for agency action, and not a review of agency action itself. Rejecting the notion that the arbitrary and capricious standard found at §706(2)(A) was the appropriate benchmark, the court indicated that in assessing 'alleged violations of NEPA, the rule of reason and objective good faith compliance were the proper standards.

This Court is guided by the

distinction drawn in *National Helium*. Since the APA §706(2)(A) guideline is not applicable in determining the adequacy of an EIS under NEPA, it would be unwise for this Court to uphold a protective order on the basis of an inapplicable standard of review. Having come to this conclusion, the question now before the Court is whether new evidence, or evidence outside the administrative record, may be introduced for the purposes of determining whether NEPA procedural guidelines have been followed.

The judicial response to this question has been a uniform acceptance and recognition of the need for evidence beyond the administrative record, in cases where the plaintiff has alleged that an EIS neglects to mention a serious environmental consequence, failed to adequately discuss

some reasonable alternative, or otherwise swept "stubborn problems or serious criticism under the rug." *County of Suffolk v. Secretary of Interior*, 526 F2d 1368 (2nd Cir. 1977). *Accord, A.T.S.&F. R.R. Co. v. Callaway*, 459 F Supp 188 (D.D.C. 1978); *Como-Falcon Coalition v. U.S. Dept. of Labor*, 465 F Supp 850 (D.Minn. 1978); *American Petroleum Institute v. Knecht*, 456 F Supp 889 (D.Cal. 1978), *National Indian Youth Council v. Andrus*, 501 F Supp 649 (D.N.M. 1980).

In addition the Court has been advised of the numerable cases where testimony outside the administrative record has been admitted or presented at an evidentiary hearing. *See, Sierra Club v. Stamm*, 507 F2d 788 (10th Cir. 1974); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F2d 1244 (10th Cir. 1973) *Friends of the Earth v. Coleman*, 513 F2d 295 (9th Cir. 1975); *Sierra Club v. Lynn*, 502 F2d 43 (5th

Cir. 1974).

The plaintiffs seek to supplement the administrative agency record as regards their claims for relief under NEPA with evidence related to four separate issues:

1. The analysis and impact of the fracturing of the bosque;

2. The impact to local residents of the widening of Montaño Road between Fourth Street and Rio Grande Boulevard;

3. The failure of the Corps to do a study or require the City to undertake a study of the actual noise, air quality and water depletion impact which would result from the Montaño Project; and

4. The failure of the Corps to analyze the alternative of widening the Alameda Bridge and compare that impact with that of the Montaño Project.

This Court must now determine whether the requested supplementation is both necessary and in conformance with the scope and nature of the NEPA claims.

It is clear that evidence which

indicates that the impact of the fracturing of the Bosque was not adequately studied is of the type specifically contemplated by the court in *County of Suffolk*, since the plaintiff has alleged that an EIS "neglects to mention a serious environmental consequence." 562 F2d at 1385. The federal defendants object to additional evidence on this topic on two grounds. First, defendants assert that they have not proffered evidence that suggests that a study of the impact of fracturing of the Bosque was not adequately done. Second, the federal defendants assert that a sufficient study was indeed undertaken, and that the results of the study appear in the agency record, at pgs. 25-27 of the Environmental Assessment.

The defendants[']' first contention, while accurate, does not take into

consideration the fact that plaintiffs have not been allowed discovery to this point and therefore their failure to proffer evidence pertaining to the importance of a thorough study of the fracturing of the Bosque is excusable. Defendants' second contention is somewhat more troublesome to the Court. While this Court acknowledged that it has no right to substitute its own judgment for the decision-making process of the agency, it is also the law that a NEPA claim "raises issues sufficiently important to permit the introduction of new evidence in the district court, including expert testimony with respect to technical matters...." *County of Suffolk*, 562 F2d at 1385. This Court will be guided by the wisdom of those courts which have allowed additional testimony to be presented at an evidentiary hearing. *Supra*. Having heard

the proferred testimony, the Court will then rule on the admissibility of the additional evidence. The Court will therefore schedule an evidentiary hearing prior to, or in conjunction with, the motion for preliminary injunction hearing already set. For reasons outlined below, the **sole** purpose of the evidentiary hearing will be to hear proffered testimony on the issue of the Corps of Engineers' analysis of the impacts of fracturing on the Bosque.

Having temporarily placed the cart before the horse, the Court now returns to the plaintiffs' request for additional discovery on the issues of widening Montaño Road, the Corps['] lack of a noise, air quality and water depletion impact analysis and lack of analysis on the Alameda alternative.

As the federal defendants have noted in their Reply in Support of Motion for

Protective Order, this case is brought to remedy federal action in connection with the issuance of the §404 permit. While it is true that the permit forms the indispensable basis for any construction of the bridge, it does not follow that the federal agency should be required to analyze the effects of non-federal action in connection with completion of the Montaño Project. Federal action, though major, does not encompass the City's avowed intention to widen Montaño Road regardless of construction of a new bridge. This is wholly a City managed and supervised project which might easily be accomplished without a §404 permit. Likewise, the decision to grant a §404 permit does not and need not concern itself with the noise, air quality and water depletion effects of the City's aspect of the project. It appears from the record that the Corps of

Engineers' chief task was to determine the effects of the dredge and fill aspects of the construction phase of the project. Additional analysis is simply beyond the scope of the requested permitting process.

Turning then to the issue of the alleged lack of due consideration given the Alameda alternative, the Court has difficulty in imagining what additional evidence might be introduced to shed light on the Corps' decision-making process. The record indicates that the Corps did not consider the Alameda alternative due to the fact that the Alameda site lies outside the jurisdiction of the City of Albuquerque. This Court sees no basis for additional testimony on this issue as the basis for the Corps' decision is clear, and additional testimony will not make it clearer. While it may be that the extra-territoriality of the Alameda site is of

itself an insufficient basis to reject consideration of the site, that is an issue which is not currently before the Court. The defendants will therefore not be required to respond to discovery requests on the Alameda alternative site issue.

The fifth claim for relief challenges the alleged failure of the Fish and Wildlife Service to recommend adequate mitigation for the alleged negative impacts to fish and wildlife caused by the completion of the Montaño Project. As the Court noted in Part I above, such relief is specifically contemplated in the APA; therefore, the appropriate scope of review on this issue is found within the APA.

The problem presented to the Court then is whether additional evidence may be used to supplement the administrative agency record in APA §706(1) cases. The Court has previously noted the general rule

requiring that judicial review be limited to the administrative agency record. *Infra* at p. 10. The Court has not been presented with, nor has it discovered on its own, any basis for not applying the general rule. The plaintiffs have listed no exception to the rule applicable to §706(1) cases. Therefore, the Court will follow the general rule and restrict the parties to the administrative agency record. The Court will not allow additional discovery or testimony on the issues related to the plaintiffs' fifth claim for relief.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that the defendant City of Albuquerque's Motion to Dismiss for Failure to State a Claim, filed March 13, 1989 is **denied**. The defendant City of Albuquerque's Motion to Dismiss for Lack of Standing, filed March

23, 1989 is **granted**. The defendant City of Albuquerque's Motion for Protective Order is moot, and is therefore **denied**. The federal defendants' Motion for Protective Order is **granted** pursuant to the following restrictions:

1. The federal defendants are not required to respond to interrogatories or other discovery requests concerning the impact to local residents of the widening of Montaño Road between Fourth Street and Rio Grande Boulevard;

2. The federal defendants are not required to respond to interrogatories or other discovery requests concerning their decision not to, or the alleged failure to, undertake a study, or require the City to undertake a study of the actual noise, air quality and water depletion impact which would result from the Montaño Project.

3. The federal defendants are not

required to respond to interrogatories or other discovery requests concerning their alleged failure to study the Alameda alternative bridge site.

4. The federal defendants are not required to respond to interrogatories or other discovery requests concerning the alleged failure of the Fish and Wildlife Service to recommend adequate mitigation.

5. The federal defendants are hereby directed to comply with the plaintiffs' discovery requests immediately regarding its study of the impact of the fracturing of the Bosque.

With respect to the issue presented in restriction #5 above, the federal defendants' Motion for Protective Order is denied.

IT IS FURTHER ORDERED that an evidentiary hearing will be held at 8:30 a.m. on Monday, May 15, 1989 for

presentation of testimony regarding the impacts of fracturing on the Bosque. The parties will be notified by subsequent order of that setting.

DATED this 8th day of May, 1989.

John E. Conway
United States District Judge

NATIONAL HISTORIC PRESERVATION ACT

16 USC §470f

Effect of Federal undertakings upon property listed in National Register; comment by Advisory Council on Historic Preservation

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic

Preservation established under title II of this Act [16 USCS §§470i *et seq.*] a reasonable opportunity to comment with regard to such undertaking.

FEDERAL-AID HIGHWAYS ACT 23 USC §138

§138. Preservation of parklands.

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Developments, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project (other than any project for a park road or parkway under section 204 of this title) which requires the use of any

publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State,or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and 2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use. In carrying out the national policy declared in this section the Secretary, in cooperation with the Secretary of the Interior and appropriate State and local officials, is authorized to conduct studies as to the most feasible Federal-aid routes for the

movement of motor vehicular traffic through or around national parks so as to best serve the needs of the traveling public while preserving the national beauty of these areas.

CLEAN WATER ACT (§404)

33 USC §1344

Permits for dredged and fill material

(a) Discharge into navigable waters at specified disposal sites. The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites. Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in

conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 403(c) [33 USC §1343(c)], and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

...

(d) "Secretary" defined. The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

...

(m) Comments on permit applications or proposed general permits by Secretary of the Interior acting through Director of United States Fish and Wildlife Service.

Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secretary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application or such proposed general permit in writing to the Secretary.

(n) **Enforcement authority not limited.** Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act [33 USC §1319].

(o) **Public availability of permits and**

permit applications. A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.

(p) Compliance. Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 309 and 505 [33 USC §§1319, 1365], with sections 301, 307 and 403 [33 USC §§1311, 1317, 1343].

(q) Minimization of duplication, needless paperwork, and delays in issuance; agreements. Not later than the one-hundred-eightieth day after the date of enactment of this subsection [enacted Dec. 27, 1977], the Secretary shall enter into agreements with the Administrator, the

Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section.

...

(s) Violation of permits. (1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the

Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a

corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such acton [action] shall be given immediately to the appropriate State.

(4) (A) Any person who willfully or negligently violates any condition or limitation in a

permit issued by the Secretary under this section shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(B) For the purposes of this paragraph, the term "person" shall mean, in addition to the definition contained in section 502(5) of this Act [33 USC §1362(5)], any responsible

corporate officer.

(5) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

NATIONAL ENVIRONMENTAL POLICY ACT

42 USC §4321

Congressional Declaration of Purpose

The purposes of this Act [42 USCS §§4321 *et seq.*) are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)
42 USC § 4332

Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [42 USCS §§ 4321 *et seq.*], and (2) all agencies of the Federal Government shall-

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the

Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 *et seq.*], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and

the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under

subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his

responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[;]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world

environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act.

Department of Transportation Act
49 USC §303
Policy on lands, wildlife and waterfowl refuges, and historic sites

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) The Secretary may approve a transportation program or project requiring the use of publicly owned land of a public

park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if -

(1) there is no prudent and feasible alternative to using that land; and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

FEDERAL HIGHWAY ADMINISTRATION,DOT
23 CFR Part 771
Environmental Impact

§771.105 Policy.

It is the policy of the Administration that:

(a) To the fullest extent possible, all environmental investigations, reviews, and consultations be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the environmental document required by this regulation.

...

§771.107 Definitions.

The definitions contained in the CEQ regulation and in Titles 23 and 49 of the United States Code are applicable. In addition, the following definitions apply.

(a) **Environmental studies.** The investigations of potential environmental impacts to determine the environmental

process to be followed and to assist in the preparation of the environmental document.

(b) **Action.** A highway or transit project proposed for FHWA or UMTA funding. It also includes activities such as joint and multiple use permits, changes in access control, etc., which may or may not involve a commitment of Federal funds.

(c) **Administration action.** The approval by FHWA or UMTA of the applicant's request for Federal funds for construction. It also includes approval of activities such as joint and multiple use permits, changes in access control, etc., which may or may not involve a commitment of Federal funds.

...

(e) Formerly § 4(f) refers to 49 USC §303 and 23 USC §138.

§771.109 Applicability and responsibilities.

(a)(1) The provisions of this regulation and the CEQ regulation apply to actions where the Administration exercises sufficient control to condition the permit or project approval. Actions taken by the applicant which do not require Federal approvals, such as preparation of a regional transportation plan are not subject to this regulation.

...

§771.111 Early coordination, public involvement, and project development.

...

(f) In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated in each EIS or finding of no significant impact (FONSI) shall:

(1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

(2) Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and

(3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

(g) For major transportation actions, the tiering of EISs as discussed in the CEQ regulation (40 CFR 1502.20) may be appropriate. The first tier EIS would focus on broad issues such as general location, mode choice, and area wide air quality and land use implications of the major alternatives. The second tier would address site-specific details on project impacts, costs, and mitigation measures.

...

§771.113 Timing of Administration activities.

(a) The Administration in cooperation with the applicant will perform the work

necessary to complete a FONSI or an EIS and comply with other related environmental laws and regulations to the maximum extent possible during the NEPA process. This work includes environmental studies, related engineering studies, agency coordination and public involvement. However, final design activities, property acquisition (with the exception of hardship and protective buying, as defined in §771.117(d), purchase of construction materials or rolling stock, or project construction shall not proceed until the following have been completed:

(1)...

(iii) A final EIS has been approved and available for the prescribed period of time and a record of decision has been signed;

...

(b) For FHWA, the completion of the

requirements set forth in paragraph (a)(1) and (a)(2) of this section is considered acceptance of the general project location and concepts described in the environmental document unless otherwise specified by the approving official. However, such approval does not commit the Administration to approve any future grant request to fund the preferred alternative.

§771.115 Classes of actions.

There are three classes of actions which prescribe a level of documentation required in the NEPA process.

(a) **Class I (EISs).** Actions that significantly affect the environment require an EIS (40 CFR 1508.27). The following are examples of actions that normally require an EIS:

(1) A new controlled access freeway.

(2) A highway project of four or more lanes on a new location.

...

§771.117 Categorical exclusions.

...

(b) Any action which normally would be classified as a CE but could involve unusual circumstances will require the Administration, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. Such unusual circumstances include:

(1) Significant environmental impacts;

(2) Substantial controversy on environmental grounds;

(3) Significant impact on properties protected by section 4(f) of the DOT Act or section 106 of the National Historic Preservation Act; or

(4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

...

§771.135 Section 4(f) (49 USC 303).

(a)(1) The Administration may not approve the use of land from a significant publicly owned public park, recreation area, or wildlife and waterfowl refuge, or any significant historic site unless a determination is made that:

(i) There is no feasible and prudent alternative to the use of land from the property; and

(ii) The action includes all possible planning to minimize harm to the property resulting from such use.

(2) Supporting information must demonstrate that there are unique problems or unusual factors involved in the use of alternatives that avoid these properties or that the cost, social, economic, and environmental impacts, or community disruption resulting from such alternatives reach extraordinary magnitudes.

(b) The Administration will determine the application of section 4(f). Any use of lands from a section 4(f) property shall

be evaluated early in the development of the action when alternatives to the proposed action are under study.

(c) Consideration under section 4(f) is not required when the Federal, State, or local officials having jurisdiction over a park, recreation area or refuge determine that the entire site is not significant. In the absence of such a determination, the section 4(f) land will be presumed to be significant. The Administration will review the significance determination to assure its reasonableness.

(e) In determining the application of section 4(f) to historic sites, the Administration, in cooperation with the applicant, will consult with the State Historic Preservation Officer (SHPO) and appropriate local officials to identify all properties on or eligible for the National Register of Historic Places (National

Register). The section 4(f) is otherwise appropriate.

ADVISORY COUNCIL ON HISTORIC PRESERVATION
36 CFR Ch. VIII (1989)

§800.2 Definitions

(A) "Act" means the National Historic Preservation Act of 1966, as amended, 16 USC 470-470w-6.

...

(o) "Undertaking" means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under section 106.

Council on Environmental Quality Regulations
40 CFR §1501 *et seq.*
Part 1501 NEPA and Agency Planning

§1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values to avoid delays later in the process and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment," as specified by §1507.2.

(b) Identify environmental effects

and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources a provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants o other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for late Federal action.

(2) The Federal agency consults early

with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

...

§1501.4. Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in §1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or and environmental assessment (categorical

exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by §1508.9(a)(1).

(c) Based on the environmental assessment make it determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§1501.7) if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant Impact (§1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding

of no significant impact available to the affected public as specified in §1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under §1507.3, the agency shall make the finding of no significant impact available for public review (including State and area wide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to §1507.3 or

(ii) The nature of the proposed action is one without precedent.

...

§1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with

jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time

(2) Participate in the scoping process (described below in §1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The

lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b) (3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

...

§1501.7 Scoping.

There shall be an early and open process for determining the scope of issues

to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (§1508.22) in the FEDERAL REGISTER except as provided in §1507.3(e).

(a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested person (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under §1507.3(c). An agency may give notice in accordance with §1506.6.

(2) Determine the scope (§1508.25) and the significant issues to be analyzed in depth in the environmental impact statement.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect ont he human environment or providing a reference to their coverage elsewhere.

(4) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(5) Indicate any public environmental assessments and other environmental impact statements which are being or will be

prepared that are related to but are not part of the scope of the impact statement under consideration.

(6) Identify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in §1502.25.

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

(b) As part of the scoping process the lead agency may:

(1) Set page limits on environmental documents (§1502.7).

(2) Set time limits (§1501.8).

(3) Adopt procedures under §1507.3 to

combine its environmental assessment process with its scoping process.

(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(c) An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

...

Part 1502 Environmental Impact Statement

§1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on

broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available

before the program has reach a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§1501.7), tiering (§1502.20), and other methods listed in §§1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

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§ 1502.9 Draft, final, and supplemental statements.

...

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing ont he proposed action or its impacts.

...

§1502.14 Alternatives including the proposed action

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§1502.15) and the Environmental Consequences (§1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable

alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation

measures not already included in the proposed action or alternatives.

...

§1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under §1502.14. It shall consolidate the discussions of those elements required by section 102(2)(C) (i), (ii), (iv), and (v) of EPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented. This section should not duplicate discussion in §1502.14. It shall include discussions of:

(a) Direct effects and their

significance (§1508.8).

(b) Indirect effects and their significance (§1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See §1506.2(d)).

(d) The environmental effects of alternatives including the proposed action. The comparisons under §1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and

cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under §1502.14(f).

...

§1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statement to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific

action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28)

...

Part 1506: NEPA and Agency Decisionmakers

§ 1506.5(a) Agency responsibility.

(a) **Information.** If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall

independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

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Part 1508: Terminology and Index

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§1508.7 Cumulative Impact

"Cumulative Impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future action regardless of

what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

...

§1508.14 Human Environment.

"Human Environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§1508.8)). This means that

economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§1508.18 Major Federal action.

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other

applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§1506.8 and 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 USC 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

...

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statement (§§1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected

single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impact and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or

proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives which include: (1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

§1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and

intensity:

(a) **Context.** This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the settling of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) **Intensity.** This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant

effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a

future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect district, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has

been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

§1508.28 Tiering.

"Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy

environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site specific statement or analyses.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

COUNCIL ON ENVIRONMENTAL QUALITY
Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations
46 Fed Reg 18026 (1981)

...

8 Q (Question 8). Section 1501.2(d) of the NEPA regulations requires agencies to provide for the early application of NEPA to cases where actions are planned by private applicants or non-Federal entities and are, at some stage, subject to federal approval of permits, loans, loan guarantees, insurance or other actions. What must and can agencies do to apply NEPA early in these cases?

8 A (Answer to Question 8). Section 1502.2(d) requires federal agencies to take steps toward ensuring that private parties and state and local entities initiate environmental studies as soon as federal involvement in their proposals can be foreseen. This section is intended to

ensure that environmental factors are considered at an early stage in the planning process and to avoid the situation where the applicant for a federal permit or approval has completed planning and eliminated all alternatives to the proposed action by the time the EIS process commences or before the EIS process has been completed.

Through early consultation, business applicants and approving agencies may gain better appreciation of each other's needs and foster a decision making process which avoids later unexpected confrontations.

Federal agencies are required by Section 1507.3(b) to develop procedures to carry out Section 1501.2(d). The procedures should include an "outreach program", such as a means for prospective applicants to conduct preapplication consultations with the lead and cooperating

agencies. Applicants need to find out, in advance of project planning, what environmental studies or other information will be required, and what mitigation requirements are likely. In connection with the later federal NEPA process. Agencies should designate staff to advise potential applicants of the agency's NEPA information requirements and should publicize their pre-application procedures and information requirements in newsletters or other media used by potential applicants.

Complementing Section 1501.2(d), Section 1506.5(a) requires agencies to assist applicants by outlining the types of information required in those cases where the agency requires the applicant to submit environmental data for possible use by the agency in preparing an EIS.

Section 1506.5(b) allows agencies to

authorize preparation of environmental assessments by applicants. Thus, the procedures should also include a means for anticipating and utilizing applicants' environmental studies or "early corporate environmental assessments" to fulfill some of the federal agency's NEPA obligations. However, in such cases the agency must still evaluate independently the environmental issues and take responsibility for the environmental assessment.

These provisions are intended to encourage and enable private and other non-federal entities to build environmental considerations into their own planning processes in a way that facilitates the application of NEPA and avoids delay.

9. Q. To what extent must an agency inquire into whether an applicant for a federal permit, funding or other approval

of a proposal will also need approval from another agency for the same proposal or some other related aspect of it?

9. A. Agencies must integrate the NEPA process into other planning at the earliest possible time to insure that planning and decision reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Specifically the agency must "provide for cases where actions are planned by ...applicants," so that designated staff are available to advise potential applicants of studies or other information that will foreseeably be required for the later federal action; the agency shall consult with the applicant if the agency foresees its own involvement in the proposal; and it shall insure that the NEPA process commences at the earliest possible time. Section 1501.2(d). (See

Question 8.)

The regulations emphasize agency cooperation early in the NEPA process. Section 1501.6. Section 1501.7 on "scoping" also provides that all affected Federal agencies are to be invited to participate in scoping the environmental issues and to identify the various environmental review and consultation requirements that may apply to the proposed action. Further, Section 1502.25(b) requires that the draft EIS list all the federal permits, licenses and other entitlements that are needed to implement the proposal.

These provisions create an affirmative obligation on federal agencies to inquire early, and to the maximum degree possible, to ascertain whether an applicant is or will be seeking other federal assistance or approval, or whether the applicant is

waiting until a proposal has been substantially developed before requesting federal aid or approval.

Thus, a federal agency receiving a request for approval or assistance should determine whether the applicant has filed separate requests for federal approval or assistance with other federal agencies. Other federal agencies that are likely to become involved should then be contacted, and the NEPA process coordinated, to insure an early and comprehensive analysis of the direct and indirect effects of the proposal and any related actions. The agency should inform the applicant that action on its application may be delayed unless it submits all other federal applications (where feasible to do so), so that all the relevant agencies can work together on the scoping process and preparation of the EIS.

...

13. Q. Can the scoping process be used in connection with preparation of an environmental assessment, i.e., before both the decision to proceed with an EIS and publication of a notice of intent?

13. A. Yes. Scoping can be a useful tool for discovering alternatives to a proposal, or significant impacts that may have been overlooked. In cases where an environmental assessment is being prepared to help an agency decide whether to prepare an EIS, useful information might result from early participation by other agencies and the public in a scoping process.

The regulations state that the scoping process is to be preceded by a Notice of Intent (NOI) to prepare an EIS. But that is only the minimum requirement. Scoping may be initiated earlier, as long as there is appropriate public notice and enough information available on the proposal so

that the public and relevant agencies can participate effectively.

However, scoping that is done before the assessment, and in aid of its preparation, cannot substitute for the normal scoping process after publication of the NOI, unless the earlier public notice stated clearly that this possibility was under consideration, and the NOI expressly provides that written comments on the scope of alternatives and impacts will still be considered.

14a. Q. What are the respective rights and responsibilities of lead and cooperating agencies? What letters and memoranda must be prepared?

14a. A. After a lead agency has been designated (Sec. 1501.5), that agency has the responsibility to solicit cooperation from other federal agencies that have jurisdiction by law or special expertise on

any environmental issue that should be addressed in the EIS being prepared. Where appropriate, the lead agency should seek the cooperation of state or local agencies of similar qualifications. When the proposal may affect an Indian reservation, the agency should consult with the Indian tribe. Section 1508.5. The request for cooperation should come at the earliest possible time in the NEPA process.

After discussions with the candidate cooperating agencies, the lead agency and the cooperating agencies are to determine by letter or by memorandum which agencies will undertake cooperating responsibilities. To the extent possible at this stage, responsibilities for specific issues should be assigned. The allocation of responsibilities will be completed during scoping. Section 1501.7(a)(4).

Cooperating agencies must assume responsibility of the development of information and the preparation of environmental analyses at the request of the lead agency. Section 15016(b)(3). Cooperating agencies are now required by Section 1501.6 to devote staff resources that were normally primarily used to critique or comment on the Draft EIS after its preparation, much earlier in the NEPA process - primarily at the scoping and Draft EIS preparation stages. If a cooperating agency determines that its resource limitations preclude any involvement , or the degree of involvement (amount of work) requested by the lead agency, it must so inform the lead agency in writing and submit a copy of this correspondence to the Council. Section 1501.6(c).

In other words, the potential

cooperating agency must decide early if it is able to devote any of its resources to a particular proposal. For this reason the regulation states that an agency may reply t a request for cooperation that "other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement." (Emphasis added). The regulation refers to the "action," rather than to the EIS, to clarify that the agency is taking itself out of all phases of the federal action, not just draft EIS preparation. This means that the agency has determined that it cannot be involved in the later stages of EIS review and comment, as well as decision making on the proposed action. For this reason, cooperating agencies with jurisdiction by law (those which have permitting or other approval authority)

cannot opt out entirely of the duty to cooperate on the EIS. See also Question 15, relating specifically to the responsibility of EPA.

14b. Q. How are disputes resolved between lead and cooperating agencies concerning the scope and level of detail of analysis and the quality of data in impact statements?

14b. A. Such disputes are resolved by the agencies themselves. A lead agency, of course, has the ultimate responsibility for the content of an EIS. But it is supposed to use the environmental analysis and recommendations of cooperating agencies with jurisdiction by law or special expertise to the maximum extent possible, consistent with its own responsibilities as lead agency. Section 1501.6(a)(2).

If the lead agency leaves out a significant issue or ignores the advise and

expertise of the cooperating agency, the EIS may be found later to be inadequate. Similarly, where cooperating agencies have their own decisions to make and they intend to adopt the environmental impact statement and base their decisions on it, one document should include all of the information necessary for the decisions by the cooperating agencies. Otherwise they may be forced to duplicate the EIS process by issuing a new, more complete EIS or Supplemental EIS, even though the original EIS could have sufficed if it had been properly done at the outset. Thus, both lead and cooperating agencies have a stake in producing a document of good quality. Cooperating agencies also have a duty to participate fully in the scoping process to ensure that the appropriate range of issues is determined early in the EIS process.

Because the EIS is not the Record of

Decision, but instead constitutes the **information** and **analysis** on which to base a decision, disagreements about conclusions to be drawn from the EIS need not inhibit agencies from issuing a joint document, or adopting another agency's EIS, if the analysis is adequate. Thus, if each agency has its own "preferred alternative," both can be identified in the EIS. Similarly, a cooperating agency with jurisdiction by law may determine in its own ROD that alternative A is the environmentally preferable action, even though the lead agency has decided in its separate ROD that Alternative B is environmentally preferable.

...

19a. Q. What is the scope of mitigation measures that must be discussed?

19a. A. The mitigation measures discussed in an EIS must cover the range of

impacts of the proposal. The measures must include such things as design alternatives that would decrease pollution emissions, construction impacts, aesthetic intrusion, as well as relocation assistance, possible land use controls that could be enacted, and other possible efforts. Mitigation measures must be considered even for impacts that by themselves would not be considered "significant." Once the proposal itself is considered as a whole to have significant effects, all of its specific effects on the environment (whether or not "significant") must be considered, and mitigation measures must be developed where it is feasible to do so. Section 1502.14(f), 1502.16(h), 1508.14.

19b. Q. How should an EIS treat the subject of available mitigation measures that are (1) outside "the jurisdiction of the lead or cooperating agencies, or (2)

unlikely to be adopted or enforced by the responsible agency?

19b. A. All relevant, reasonable mitigation measures that could improve the project are to be identified, seen if they are outside the jurisdiction of the lead agency or the cooperating agencies, and thus would not be committed as part of the RODs of these agencies. Sections 1502.16(h), 1505.2(c). This will serve to alert agencies or officials who can implement these extra measures, and will encourage them to do so. Because the EIS is the most comprehensive environmental document, it is an ideal vehicle in which to lay out not only the full range of environmental impacts but also the full spectrum of appropriate mitigation.

However, to ensure that environmental effects of a proposed action are fairly assessed, the probability of the mitigation

measures being implemented must also be discussed. Thus the EIS and the Record of Decision should indicate the likelihood that such measures will be adopted or enforced by the responsible agencies. Sections 1502.16(h), 1505.2(. If there is a history of nonenforcement or opposition to such measures, the EIS and Record of Decision should acknowledge such opposition or nonenforcement. If the necessary mitigation measures will not be ready for a long period of time this fact, of course, should also be recognized.

...

21. Q. Where an EIS or an EA is combined with another project planning document (sometimes called "piggybacking"), to what degree may the EIS or EA refer to and rely upon information in the project document to satisfy NEPA's requirements?

21. A. Section 1502.25 of the

regulations requires that draft EISs be prepared concurrently and integrated with environmental analyses and related surveys and studies required by other federal statutes. In addition, Section 1506.4 allows any environmental document prepared in compliance with NEPA to be combined with any other agency document to reduce duplication and paperwork. However, these provisions were not intended to authorize the preparation of a short summary or outline EIS, attached to a detailed project report or land use plan containing the required environmental impact data. In such circumstances, the reader would have to refer constantly to the detailed report to understand the environmental impacts and alternatives which should have been found int he EIS itself.

The EIS must stand on its own as an analytical document which fully informs

decision makers and the public of the environmental effects of the proposal, and those of the reasonable alternatives. Section 1502.1. But, as long as the EIS is clearly identified and is self-supporting, it can be physically included in or attached to the project report or land use plan, and may use attached report material as technical backup.

Forest Service environmental impact statements for forest management plans are handled in this manner. The EIS identifies the agency'[s preferred alternative, which is developed in detail as the proposed management plan. The detailed proposed plan accompanies the EIS through the review process, and the documents are appropriately cross-referenced. The proposed plan is used for EIS readers as an example, to show how one choice of management option translates into effects

on natural resources. This procedure permits initiation of the 90-day public review proposed forest plans, which is required by the national Forest Management.

All the alternatives are discussed in the EIS which can be read as an independent document. The details of the management plan are not repeated int he EIS, and vice versa. This is a reasonable functional separation of documents: the EIS contains information relevant to the choice among alternatives; the plan is a detailed description of proposed management activities suitable for use by the land managers. This procedure provides for concurrent compliance with the public review requirements of both NEPA and the National Forest Management Act.

Under some circumstances, a project report or management plan may be totally merged with the EIS, and the document

labeled as both "EIS" and "management plan" or "project report". This may be reasonable where the documents are short, or where the EIS format and the regulations for clear, analytical EISs also satisfy the requirements for a project report.

...

24a. Q. When are EISs required on policies, plans or programs?

24. A. An EIS must be prepared if an agency proposed to implement a specific policy, to adopt a plan for a group of related actions, r to implement a specific statutory program or executive directive. Section 1508.18. In addition, the adoption of official policy in the form of rules, regulations and interpretations pursuant to the Administrative Procedure Act, treaties, conventions, or other formal documents establishing governmental or agency policy which will substantially alter agency

programs, could require an EIS. Section 1508.18. In all cases, the policy, plan, or program must have the potential for significantly affecting the quality of the human environment in order to require an EIS. It should be noted that a proposal "may exist in fact as well as by agency declaration that one exists." Section 1508.23.

24b. Q. When is an area-wide or overview EIS appropriate?

24b. A. The preparation of an area-wide or overview EIS may be particularly useful when similar actions, viewed with other reasonably foreseeable or proposed agency actions, share common timing or geography. For example, when a variety of energy projects may be located in a single watershed, or when a series of new energy technologies may be developed through federal funding, the overview or area-wide

EIS would serve as a valuable and necessary analysis of the affected environment and the potential cumulative impacts of the reasonably foreseeable actions under that program or within that geographical area.

24c. Q. What is the functions of tiering in such cases?

24c. A. Tiering is a procedure which allows and agency to avoid duplication of paperwork through the incorporation by reference of the general discussions and relevant specific discussions from an environmental impact statement of broader scope into one of lesser scope or vice versa. In the example given in Question 24b, this would mean that an overview EIS would be prepared for all of the energy activities reasonably foreseeable in a particular geographic area or resulting from a particular development program. This impact statement would be followed by

site-specific or project-specific EISs. The tiering process would make each EIS of greater use and meaning to the public as the plan or program develops, without duplication of the analysis prepared for the previous impact statement.

...

32. Q. Under what circumstances do old EISs have to be supplemented before taking action on a proposal?

32. A. As a rule of thumb, if the proposal has not been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement.

If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or

information relevant to environmental concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal. Section 1502.9(c).

...

36a Q. - How long and detailed must an environmental assessment (EA) be?

36a A. The environmental assessment is a concise public document which has three defined functions. (1) It briefly provides sufficient evidence and analysis for determining whether to prepare an EIS; (2) it aids in agency's compliance with NEPA when no EIS is necessary, i.e., it helps to identify better alternatives and mitigation measures; and (3) it facilitates preparation of an EIS when one is

necessary. Section 1508.9(a).

Since the EA is a concise document, it should not contain long descriptions or detailed data which the agency may have gathered. Rather, it should contain a brief discussion of the need for the proposal, alternatives to the proposal, the environmental impacts of the proposed action and alternatives, and a list of agencies and persons consulted. Section 1508.9(b).

While regulations do not contain page limits for EA's, the Council has generally advised agencies to keep the length of EAs to not more than approximately 10-15 pages. Some agencies expressly provide page guidelines (e.g., 10-15 pages in the case of the Army Corps). To avoid undue length, the EA may incorporate by reference background data to support its concise discussion of the proposal and relevant

issues.

36b. Q. Under what circumstances is a lengthy EA appropriate?

36b. A. Agencies should void preparing lengthy EAs except in unusual cases, where a proposal is so complex that a concise document cannot meet the goals of Section 1508.9 **and** where it is extremely difficult to determine whether the proposal could have significant environmental effects. In most cases, however, a lengthy EA indicates that an EIS is needed.

...

40. Q. If an environmental assessment indicates that the environmental effects of a proposal are significant but that, with mitigation, those effects may be reduced to less than significant levels, may the agency make a finding of no significant impact rather than prepare and EIS? Is that a legitimate function of an EA and

scoping?

40. A. Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement. Sections 1508.8, 1508.27.

If a proposal appears to have adverse effects which would be significant, and certain mitigation measures are then developed during the scoping or EA stages, the existence of such possible mitigation does not obviate the need for an EIS. Therefore, if scoping of the EA identifies certain mitigation possibilities without

altering the nature of the overall proposal itself, the agency should continue the EIS process and submit the proposal, and the potential mitigation, for public and agency review and comment. This is essential to ensure that the final decision is based on all the relevant factors and that the full NEPA process will result in enforceable mitigation measures through the Record of Decision.

In some instances, where the proposal itself so integrates mitigation form the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant (e.g., where an application for a permit for a small hydro dam is based on a binding commitment to build fish ladders, to permit adequate down stream flow, and to replace

any lost wetlands, wildlife habitat and recreational potential). In those instances, agencies should make the FONSI and EA available for 30 days of public comment before taking action. Section 1501.4(e)(2).

Similarly, scoping may result in a redefinition of the entire project, as a result of mitigation proposals. In that case, the agency may alter its previous decision to do an EIS, as long as the agency or applicant resubmits the entire proposal and the EA and FONSI are available for 30 days of review and comment. One example of this would be where the size and location of a proposed industrial park are changed to avoid affecting a nearby wetland area.

Supreme Court, U.S.
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(2)

No. 90-783

In The

Supreme Court of the United States

October Term, 1990

VILLAGE OF LOS RANCHOS DE ALBUQUERQUE and RIO GRANDE VALLEY PRESERVATION SOCIETY,

Petitioners,

v.

R.H. BARNHART, Administrator of the Federal Highway Administration, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT CITY OF ALBUQUERQUE'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the City funded Montaño Project is a major federal action significantly affecting the quality of the human environment or a federal or federally assisted undertaking because the Federal Highway Administration funded a location environmental study, participated in the preparation of an environmental impact statement and approved the final environmental impact statement, which selected the locations of the preferred alternative alignments.

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VILLAGE OF LOS RANCHOS DE ALBUQUERQUE and RIO GRANDE VALLEY PRESERVATION SOCIETY,

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R.H. BARNHART, Administrator of the Federal Highway Administration, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT CITY OF ALBUQUERQUE'S[1] BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In 1977, the Urban Transportation Planning Policy Board of the local Council of Governments requested a

[1] Respondent is a political subdivision of the State of New Mexico and has no parent companies, subsidiaries or affiliates.

feasibility study of alternative river crossings in the Albuquerque metropolitan area. The study focused on the engineering feasibility of the alternatives, with some attention to environmental impacts. As a result of this study, in 1979, the Policy Board initiated the preparation of an Environmental Impact Statement ("EIS") and identified three principal corridors, including the Montaño and Paseo del Norte corridors, for particular consideration. The Policy Board requested the New Mexico Highway Department to serve as lead agency to coordinate the potential cooperative efforts of City, County, State and Federal agencies concerned with transportation projects.

The Federal Highway Administration ("FHWA") programed federal financial assistance of $58,972.50 for studies and technical tasks related to the EIS, took an active part as a study team member in the preparation of the EIS and reimbursed the New Mexico Highway Department $48,113.00 for studies and tasks related to the EIS.

In 1984, the FHWA issued its Record of Decision which approved the final EIS and authorized the Montaño and the Paseo del Norte projects, which were approved as the preferred alternative alignments, to proceed to the next stage of development as federal aid highway projects. The Record of Decision provides that the "Federal Highway Administration Division office will monitor the project . . . if Federal-aid Highway funds are used for its construction". Federal involvement in the preferred alternatives ended at this point, because the City of Albuquerque ("City") and the State of New Mexico determined that there were essentially no federal funds available for the Montaño and Paseo del Norte

projects. The City and the State chose not to seek any federal money to build either the Paseo del Norte or the Montaño bridges.

In 1983 and 1985, when the possibility of federal funds failed to materialize, the voters of Albuquerque approved the issuance of municipal general obligation bonds in the total sum of $10.3 million to fund the estimated $10 million cost of the Montaño Project. The City has completed the design of the Montaño Bridge and has begun right-of-way acquisition. The Federal Highway Administration has played no part in any of these activities.

The City does not intend to apply for or use any financial, technical or other assistance from the FHWA or the State of New Mexico to complete the Montaño Project. The Petitioners acknowledge that the Montaño Project will be constructed with City funds (Petition, p.12) and that the Montaño Project is a local project (Petition, p.43).

REASONS WHY THE WRIT SHOULD BE DENIED

1. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THE OTHER CIRCUITS.

A. National Environmental Policy Act of 1970 ("NEPA"), 42 U.S.C. § 4331 *et seq.*

The Tenth Circuit held that the contribution of nearly $59,000.00 to the cost of the EIS and the approval of the EIS by the FHWA and eligibility of the Montaño Project for federal funds are not sufficient to establish a major federal action requiring compliance with NEPA.

Petitioners rely primarily on *La Raza Unida v. Volpe*, 337 F.Supp. 221 (N.D. Cal. 1971), aff'd, 488 F.2d 559 (9th Cir. 1973), cert. den., 417 U.S. 968 (1974), to demonstrate that the Tenth Circuit's decision conflicts with the decisions of other circuit courts. *La Raza* held that NEPA applies to a project when the FHWA grants location approval. In the instant case, in accordance with the *La Raza* precept, an EIS was prepared before the general Montaño alignment was approved by the FHWA.

In *La Raza*, the court was concerned with identifying the point at which NEPA obligations begin, not when they might end. The district court specifically declined to address "whether the federal protective devices would continue to apply if the state forecloses the possibility of federal assistance". 337 F.Supp. at 231, n.5.

Once the federal government participates in a project, the project is not necessarily forever federal. *City of Boston v. Volpe*, 464 F.2d 254 (1st Cir. 1972); *Ely v. Velde*, 497 F.2d 252, (4th Cir. 1974) (a prison project, which was originally to have been funded with federal money, was not a federal project because the State withdrew its request for funds before construction had begun and before the federal government had spent money on any phase of the project).

The funding by the FHWA of the planning process of a project is not a major federal action. *Atlanta Coalition on Transportation Crisis, Inc. v. Atlanta Regional Commission*, 599 F.2d 1333 (5th Cir. 1979) (federal assistance to the planning process is not a commitment of the federal government to fund the project); *Citizens for Balanced Environment and Transportation v. Volpe*, 376 F.Supp. 806

(D.Conn. 1974), aff'd, 503 F.2d 601 (2nd Cir. 1974), cert. den., 423 U.S. 870 (1975) (the expenditure of less than $50,000.00 of FHWA funds for planning a proposed road was insignificant to render a multi-million dollar highway a federal action).

The approval of an EIS is acceptance of the general project location. 23 C.F.R. § 771.113(b) (1985, 1990). The approval of an EIS, as location approval, is not an action that has significant effect on the environment, *Maryland Wildlife Federation v. Dole*, 747 F.2d 229 (4th Cir. 1984), or a federal action, *Jette v. Bergland*, 579 F.2d 59 (10th Cir. 1978). It is a considered discussion of the environmental consequences of proposed action that the agency may or may not take. If the agency neither takes the proposed action nor in any way aids others in taking it, it makes no sense to continue imposing NEPA obligations. See *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975), cert. den., 424 U.S. 927 (1976).

Location approval does not commit the FHWA to approve federal funds for a project, 23 C.F.R. § 771.113(b) (1990), or obligate local governments to accept federal funding, 23 U.S.C. § 145. In *Citizens for Balanced Environment, supra*, the court refused to follow *La Raza, supra*, and held that neither a location approval, nor its equivalent (known as "route revision approval"), irrevocably committed the federal or state governments to FHWA funding or, consequently, to NEPA duties:

> [N]either step commits the state to build the highway at all, nor to use federal funds if the highway is built, and surely neither step commits the agency to supply federal funds. Moreover, determination of whether the federal

> government is sufficiently involved in a highway to make it a "federal action" within the meaning of NEPA should not depend on the state of mind of the potential state applicant for funds. 376 F.Supp. 812.

The possibility of future federal funding does not make a project a federal action. *City of Highland Park, supra; Bennett v. Taylor,* 505 F.Supp. 800 (M.D.La. 1980). Where the planning process is structured or a project is designed to preserve the eligibility for federal funding, the possibility of future federal funding does not make a project a federal action. *Historic Preservation Guild of Bay View v. Burnley,* 896 F.2d 985 (6th Cir. 1989); *Atlanta Coalition on Transportation, supra; Friends of the Earth v. Coleman,* 518 F.2d 323 (9th Cir. 1975); *Citizens for Balanced Environment, supra.*

Because the Montaño Project will be built with City funds, the FHWA cannot reimburse the City for the cost of the Montaño Project. The FHWA does not pay for completed projects that were not subject to FHWA monitoring and approval before and during construction. See 23 U.S.C. § 114(a) and § 121(c); and 23 C.F.R. § 1.9(a) (1987). NEPA cannot apply to the Montaño Project. *Bennett, supra.*

In *Citizens Civic Association of Door County v. Coleman,* 417 F.Supp. 975 (W.D. Wisc. 1976), the FHWA participated in the planning process of a project to preserve the state's eligibility for federal funds in the event the state should seek federal aid; provided guidance for and participated in the preparation of the EIS; approved the location of the preferred alternative and approved the design of the approach roadways to the project. The state did not seek,

program, or authorize federal aid for preliminary engineering, right-of-way, or construction. The Court held that the project had not become a federal action.

In other cases relied on by Petitioners, the project in issue had proceeded, with federal approval and funding, through the design phase and to construction or the evidence showed that the decision to proceed without those funds was a deliberate attempt to circumvent NEPA's requirements. *Scottsdale Mall v. State of Indiana*, 549 F.2d 484 (7th Cir. 1977), cert. den., 434 U.S. 1008 (1978) (design, preliminary engineering and right-of-way acquisition); *Indian Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir. 1973) (no dispute that state seeking federal funding); *City of Boston v. Volpe, supra*, (FAA allocated more than $1 million for taxiway construction); *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d 1013 (5th Cir. 1971), cert. denied, 406 U.S. 933 (1972) (deliberate attempt to circumvent NEPA by shifting funds). Congress subsequently rejected the Fifth Circuit's suggestion in *San Antonio, supra*, that a project could remain federal for the purpose of NEPA even if the State repaid all of the federal funding. The Federal Aid Highway Act of 1973 provided that the North Expressway in San Antonio, which had been the subject of *San Antonio*, would cease to be a federal aid highway program when all funds theretofore paid to the State by FHWA had been returned. When Texas had repaid the funds, the Fifth Circuit held that the North Expressway was exempt from the application of NEPA. *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*, 496 F.2d 1017 (5th Cir. 1974), cert. den., 420 U.S. 926 (1975).

B. Section 4(f) of the Department of Transportation Act 49 U.S.C. § 303 and of the Federal Aid Highway Act, 23 U.S.C. § 138.

In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), the Court stated that Section 4(f) prohibits the use of federal funds to finance the construction of highways through public parks if feasible and prudent alternatives exist. Section 4(f) does not apply to the Montaño Project because the City has funded the construction of the Montaño Project through municipal general obligation bonds and will not seek any federal funds for the project.

C. National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 *et seq.*

NHPA applies to a project only if the project is under the direct or indirect jurisdiction of a federal agency or licensed or assisted by a federal agency. 36 C.F.R. § 800.2(O) (1987, 1989). The Montaño Project is not under the jurisdiction of the FHWA. There is no dispute that the City can build the Montaño Project without FHWA involvement. The FHWA has not issued any licenses for the Montaño Project.

NHPA is not applicable unless federal funds are approved to aid in construction of a project. *River v. Richmond Metropolitan Authority*, 359 F.Supp. 611 (E.D. Va. 1973), aff'd 481 F.2d 1280 (4th Cir. 1973); *Hall County Historical Society v. Georgia Department of Transportation*, 447 F.Supp. 741 (N.D. Ga. 1978) (compliance with NHPA

was not required if the state withdrew requests for federal funds for project construction and reimbursed federal funds that had been expended); *Hart v. Denver Urban Renewal Project*, 551 F.2d 1178 (10th Cir. 1977) (under NHPA, the key element is federal funding, not federal approval); *Edwards v. First Bank of Dundee*, 534 F.2d 1242 (7th Cir. 1976) (no NHPA duties if no federal funding); *Weintraub v. Rural Electrification Administration*, 457 F.Supp. 78 (M.D. Pa. 1978) (to same effect). The fact that a project is eligible for federal funding does not make it subject to NHPA. *Historic Preservation Guild, supra.*

The analysis under NHPA is essentially the same as the analysis under NEPA. *Ringsred v. Duluth*, 838 F.2d 1305 (8th Cir. 1987) (treating NHPA's "undertaking" requirement as essentially coterminous with NEPA's "major federal action" requirement); *Bennett, supra.* If the FHWA participation in the Montaño Project is not a major federal action under NEPA, it is not a federal or federally assisted undertaking under NHPA.

2. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE ISSUE OF COMPLIANCE BY THE CORPS OF ENGINEERS WITH FEDERAL ENVIRONMENTAL LAWS.

In their second reason for the grant of a writ, Petitioners assert that the Montaño Project is a major federal action because the FHWA knew that the City would have to obtain a Section 404 dredge and fill permit from the Corps of Engineers to build the Montaño Bridge.

A. The FHWA has no authority to issue Section 404 permits. The Secretary of the Army, acting through the

Chief of the Engineers, has the exclusive authority to issue Section 404 permits. 33 U.S.C. § 1344. The Secretary of the Army and the Corps of Engineers are not parties to the instant case.

B. The issue of whether the Secretary of the Army properly issued a Section 404 permit for the Montaño Bridge is the subject of separate litigation, *Village of Los Ranchos v. Hatch*, No. CIV 88-1032JC (D.N.M.), Nos. 90-2012, 90-2026, 90-2052 (10th Cir.) (pending) (Petition, p.70a).

C. The issue of whether the issuance of a Section 404 permit is a major federal action was not presented below and is not within the scope of the decision below. The facts of record do not support the formulation or resolution of this issue.

D. The FHWA is not obligated to prepare an EIS for issuance of a Section 404 permit.

E. The federal environmental laws do not apply until there is a major federal action or federal undertaking. The instant action was filed on August 31, 1984. The Corps of Engineers issued the Section 404 permit for the Montaño Bridge on July 6, 1986. If the FHWA participation in the Montaño Project was not a major federal action or undertaking, the subsequent issuance by the Corps of Engineers of a Section 404 permit for the Montaño Bridge cannot make the prior FHWA action a major federal action or undertaking.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

No. 90-783

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

VILLAGE OF LOS RANCHOS DE ALBUQUERQUE, ET AL.,
PETITIONERS

v.

R.H. BARNHART, ADMINISTRATOR
FEDERAL HIGHWAY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a city-funded bridge construction project qualifies as a "major federal action" or a "federal or federally assisted undertaking" that requires the Federal Highway Administration to secure project compliance with federal environmental statutes.

2. Whether the Federal Highway Administration is obliged to comply with federal environmental statutes in regard to the city's bridge construction project based on the requirement under Section 404b of the Federal Water Pollution Control Act (the Clean Water Act), 33 U.S.C. 1344, that the city obtain a dredge-and-fill permit for the project from the United States Army Corps of Engineers.

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v.

R.H. BARNHART, ADMINISTRATOR
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 906 F.2d 1477. The district court opinion (Pet. App. 36a-65a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1990. The court of appeals denied the petition for rehearing on August 22, 1990. The petition for a writ of certiorari was filed on November 16,

1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from a proposal by the City of Albuquerque, known as the North Valley River crossing project, to build new bridges over the Rio Grande River in the northwest part of the city. Although the Montano Bridge—the project component that is the subject of this petition—is to be funded and built exclusively by the City without any federal funds, Pet. 12, Pet. App. 5a-6a, petitioners nevertheless claim that the bridge is a "major federal action" requiring compliance by the Federal Highway Administration (FHWA) with procedural obligations imposed by the National Environmental Policy Act of 1969, 42 U.S.C. 4332 *et seq.* (NEPA),[1] the National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.* (NHPA), and Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303(f).[2]

1. In 1977, the local Urban Transportation Planning Policy Board (the Policy Board) began to study alternative bridge sites in the area around the pro-

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[1] For example, Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), provides that all agencies of the federal government shall prepare a detailed statement on the environmental consequences of, and alternatives to, "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."

[2] Provisions in Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303(f), are identical to those contained in the Federal-Aid Highway Act of 1968, 23 U.S.C. 138. These provisions are commonly referred to as "Section 4(f)," and are cited as such by the plaintiffs in their complaint. We will refer to the claims arising from these provisions as the "Section 4(f)" issue.

posed Montano project, focussing on the engineering feasibility of the alternatives and giving some consideration to environmental effects. Although it was determined early on in the project that no federal funding would be used to build the bridges, see pp. 4-5, *infra*, the City and the State of New Mexico decided to commence an environmental review process in accordance with federal requirements.[3]

In 1979, the Policy Board initiated the preparation of a full-scale Environmental Impact Statement (EIS) of the North Valley River crossing project with the State Highway Department serving as the lead agency (DX 2 (Bower) at 16).[4] The Federal

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[3] There were three reasons for the decision to proceed in this manner. First, the City continued to hope that the federal government might create some "windfall" funding suitable for application to this project. Mathias Vol. 1, at 111; DX 8 (Alonzo affidavit) at 2, ¶¶ 6, 7. In the unlikely event that such a windfall did become available, continued compliance with federal environmental review procedures would place the State in the best position to receive funding. *Id.* at 111-112, 116; DX 2 (Bower) at 89-90. Second, the City and State had represented to the public that the bridge projects would be developed according to federal procedures. Mathias Vol. 1, at 115-116; DX 2 (Bower) at 51-52; DX 10 (Hoover affidavit) at 2. Third, the City believed that compliance with these procedures was a better way to develop public projects. See DX 5 (Martin) at 29-30 (use of procedures in compliance with federal requirements "leads to better organization of project development").

(Exhibits to the Defendants' Motion for Summary Judgment in the district court (Docs. 99-101) are cited as "DX," with a short description of the document and a page deference. Thus, "DX 2 (Bower) at 14" refers to Defendants' Exhibit 2 to their Motion for Summary Judgment, which is the Bower deposition, at page 14.)

[4] The 1975 amendments to NEPA permit state highway agencies to prepare environmental impact statements, subject

Highway Administration (FHWA) provided technical advice and contributed $59,000 for expenses related to the preparation of the Environmental Impact Statement. DX 8 (Alonzo affidavit) at 2; Pet. App. 5a.

The Federal Highway Administration approved the Final Environmental Impact Statement on September 16, 1983, and, on January 23, 1984, issued a Record of Decision for that approval. Federal involvement ended at this point, however. After it became clear that there were insufficient federal funds for the bridge project and that devotion of federal funds to the project would exhaust the state's federal highway money for years to come,[5] the City of Albuquerque decided to finance the project exclusively through general obligation bonds. Pet. App. 6a.[6]

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to federal review and approval. 42 U.S.C. 4332(2)(D), added in Act of Aug. 9, 1975, Pub. L. No. 94-83, 89 Stat. 424.

[5] Together, the two proposed bridges were expected to cost at least $50 million. The total annual allocation to New Mexico of Urban System Funds—the only category of federal funds available to finance the bridges—was $4 million. DX 2 (Bower) at 6.

[6] After the Final EIS was approved in 1983, the projects were listed on the New Mexico State Highway Department's Five-Year Plan under the category of "Urban Relief Route—Unfunded." DX 2 (Bower) at 33. This category covered projects that were planned for execution within the next five years, but for which funding had not been identified. *Ibid.* The State had no plans to commit federal funds to projects in this category "and the people who were interested in those projects clearly knew that." *Id.* at 34-35.

Ultimately, the Paseo del Norte Bridge, which opened in December 1987, was constructed entirely with state and local funds. To quell opposition to the Paseo del Norte project, the State entered into an agreement and settlement with the petitioners providing that the State would "not provide any legal

The City proceeded to complete the design of the bridge and to begin right-of-way acquisition without any aid, assistance, or participation by the Federal Highway Administration.[7]

2. Petitioners filed suit in district court seeking a declaration that the Montano Bridge project is a federal action that must comply with federal environmental laws. Petitioners also sought an injunction against the Federal Highway Administration's further participation in the project, and an order declaring the approval of the EIS by the FHWA to be in violation of federal law. Pet. App. 38a-39a.

The federal defendants moved for summary judgment, urging that the Montano Bridge (the only project left in dispute after the settlement agreement concerning the Paseo del Norte Bridge, see note 6, *supra*) was not a federal project and that the FHWA therefore could not provide the requested relief. Finally, the FHWA argued that (1) petitioners lacked standing in failing to show how the federal government's actions had harmed them, since

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or technical advice," nor "participate in or provide assistance to the development of" other proposed bridge crossings, including the Montano River project. DX 11 (Settlement Agreement) at 15. This agreement, signed in October 1985, completely disabled the State from providing state funds for the Montano Bridge Project and from seeking federal aid for the project on behalf of the City. *Ibid.*

[7] The City has, however, sought and received a Corps of Engineers "dredge-and-fill" permit for the Montano Bridge pursuant to Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. 1344. The Section 404 permit is the subject of a separate action by petitioners against the Corps of Engineers challenging the Corps' compliance with NEPA and other environmental statutes, which is now on appeal before the Tenth Circuit. See *Village of Los Ranchos de Albuquerque* v. *Hatch*, 10th Cir. Nos. 90-2026 & 90-2052. See note 12, *infra*.

the project was being built by the City alone and (2) the suit was premature because the federal government's approval of the EIS was not "final agency action" subject to review under the Administrative Procedure Act.

The district court rejected the government's arguments on standing and ripeness (Pet. App. 45a-49a), but entered summary judgment for the federal defendants. The court held that the project was local, not federal, action, and that the FHWA therefore had no duties under NEPA, the National Historic Preservation Act of 1966, or the Department of Transportation Act. Pet. App. 49a-59a; 63a-65a.[8]

3. The court of appeals affirmed. Pet. App. 1a-33a. Relying on the reasoning in *Citizens for Balanced Env't & Transp., Inc.* v. *Volpe*, 376 F. Supp. 806, 812-813 (D. Conn.), aff'd, 503 F.2d 601 (2d Cir. 1974), cert. denied, 423 U.S. 870 (1975) [hereinafter *Citizens for Balanced Env't*], the court of appeals concluded that mere eligibility for federal funds does not create federal action sufficient to trigger federal environmental obligations. Pet. App. 12a-15a. The court of appeals rejected the reasoning in *La Raza Unida* v. *Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971), aff'd, 488 F.2d 559 (9th Cir. 1973), cert. denied, 417 U.S. 968 (1974), in which a state agency that had taken preliminary steps to keep open the option of federal funding was enjoined

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[8] The court also held that the FHWA was not in violation of Exec. Order No. 11,990, which requires the federal government to minimize wetlands destruction, and that petitioners' factual assertions were insufficient to establish that the crossings project had been "improperly segmented" for NEPA analysis from a federally funded highway widening project several miles away. Pet. App. 59a-62a; see also Pet. App. 20a-26a.

from proceeding with a state-funded highway project without complying with certain federal environmental and relocation assistance requirements.

The court of appeals further rejected petitioners' argument that certain actions by the FHWA in the formative stages of the project—including the expenditure of $59,000 toward the $75,000 cost of the EIS and approval of the EIS—rendered the project federal or constituted major federal action triggering obligations under NEPA and other federal environmental statutes. Pet. App. 17a. The court noted that the EIS on which federal funds were expended was preliminary in nature, and that the amount expended was insignificant in light of the $10.3 million estimated cost of the entire project. The court further explained (Pet. App. 16a-17a):

> The fact that the state did voluntarily request a federal EIS, though they were not legally bound to do so, should not, without more, constrain the state to make the entire project federal. Unless the state is actually receiving or is planning to receive federal funding for a project, mere preparation and approval of an EIS is not 'major federal action.' * * * It would be anomalous indeed to say that in a case such as this, where there is no showing that the local defendants were involved in a sham transaction to evade federal environmental requirements, that the preparation and approval of an EIS is a major federal action for which an EIS must be prepared and approved.

The court of appeals characterized the role of the FHWA in the project as, at most, "g[iving] advice as to the location of the bridge." The court concluded that, absent some ability by the federal defendants to control the outcome or direction of the

project, this was not enough to establish a "major federal action." Pet. App. 20a.

4. Petitioners filed a petition for rehearing. They argued for the first time that the FHWA's actions should be classified as major federal action because it was known "from the beginning" that it would be necessary to obtain a dredge-and-fill permit from the U.S. Army Corps of Engineers for the Montano Bridge project pursuant to Section 404(b) of the Clean Water Act. Reh'g Pet. 5, 9. The court denied the petition for rehearing without opinion. Pet. App. 34a-35a.

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[9] For essentially the same reasons underlying its NEPA analysis, the court of appeals rejected petitioners' claims that the Montano bridge project was a "federally assisted undertaking" requiring compliance with the National Historic Preservation Act of 1966, 16 U.S.C. 470(f) (Pet. App. 26a-28a), and that it was a federal transportation project requiring compliance with Section 4(f) of the Department of Transportation Act. Pet. App. 28a-31a. The court also affirmed the district court's rejection of petitioners' claims, not renewed in this Court, that the bridge project had been "improperly segmented" (Pet. App. 20a-26a), and that the federal government failed to comply with Exec. Order No. 11,990. Pet. App. 31a-33a.

ARGUMENT

Petitioners contend that the court of appeals' decision is in error because the court failed adequately to consider "extensive federal involvement" in the Montano Bridge project. Pet. i. The FHWA's role, however, was extremely limited and confined to only the preliminary stages of the project. After the City decided to proceed with the Montano Bridge project using only local funds, federal involvement came to an end. Because the Federal Highway Administration has no current role in the development and construction of the Montano Bridge, there is no federal action at all, much less major federal action that triggers procedural obligations under NEPA.

1. The requirements established by NEPA apply to any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). A number of courts have emphasized that, for NEPA to apply, there must be action by a federal entity. See *Weinberger* v. *Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 143 (1981) (purpose of NEPA is "to inject environmental considerations into the *federal* agency's decisionmaking process") (emphasis added); *Macht* v. *Skinner*, 916 F.2d 13, 18 (D.C. Cir. 1990) ("NEPA requires *federal agencies*—not states or private parties—to consider the environmental impacts of *their proposed actions.*") (emphasis on last phrase added); *Park County Resource Council, Inc.* v. *United States Dep't of Agriculture*, 817 F.2d 609, 622 (10th Cir. 1987) (there is federal action requiring environmental compliance if federal government has "firm plans" to develop land); accord *Citizens for Responsible Area Growth* v. *Adams*, 680 F.2d 835, 839 (1st Cir. 1982).

In this case, the City of Albuquerque chose to prepare a full-scale environmental impact study. Subsequent approval of that study by the FHWA had the effect of temporarily keeping open the option of federal funding for the Montano Bridge, but the decision was made early in the project not to use federal funds. Where a project was originally treated as if it might become a major federal action, but instead becomes a purely local project before any environmentally significant step is taken, NEPA does not, and should not apply. As stated in the opinion for the district court in *Citizens for Balanced Env't*, 376 F. Supp. at 812 (which was adopted by the court of appeals in that case, 503 F.2d at 601-602):

> Solicitude for the environment cannot substitute for legislation. Congress has not applied NEPA to all highways that the states are *eligible* to fund with federal dollars. * * * The State's option to use federal dollars, though open virtually until the concrete is poured, is nonetheless an option, and the State's choice should not be restricted simply because one alternative of the option (using state dollars) might result in less adequate assessment of environmental considerations. If the highway is not a federal action, then a state's decision to avoid federal involvement cannot have the paradoxical effect of establishing federal involvement.

Moreover, not only is it difficult to see why the FHWA should be required to execute the Montano Bridge project in a manner that complies with the requirements of NEPA, it is also difficult to see how it could do so. As the court of appeals observed (Pet. App. 19a (quoting *Sierra Club* v. *Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988))), "the distinguishing feature of 'federal' involvement is the ability to in-

fluence or control the outcome in material respects. The EIS process is supposed to inform the decisionmaker. This presupposes he has judgment to exercise." Because the FHWA did not provide any funds for the actual construction of the Montano Bridge, it lacks control over the execution of the project. Here, the FHWA played, at most, a minor role in early stages of the project, but has not exercised (and will not exercise) any authority over the actual planning, construction or financing of the Montano Bridge itself. As a practical matter, the FHWA simply does not now have any "judgment to exercise."

2. Petitioners err in asserting that the court of appeals "arbitrarily removed from the scope of these [environmental] statutes every state highway project which had not, at the time it is challenged, received federal funds for * * * construction or had such funding approved." Pet. 20-21. The court of appeals did not hold that there is no obligation to comply with NEPA for projects that eventually *do* receive federal funds. Rather, the court of appeals held, correctly in our view, that mere eligibility for federal funding, *without more*, does not make a local project federal. Pet. App. 10a-15a. And since the preparation of an EIS is not in itself "major federal action" sufficient to trigger NEPA, eligibility for federal funding, even in combination with federal approval of an EIS at a preliminary stage, is not enough to establish federal action where the execution and financing of a project remains entirely under local control.

3. The analysis under the other environmental statutes cited by petitioners is similar. Procedural obligations under the National Historic Preservation Act of 1966 and Section 4(f) of the Department of Transportation Act require a measure of ongoing fed-

eral involvement not present here. See *Macht* v. *Skinner*, 916 F.2d at 15-16 n.4 (expenditure of federal funds for preliminary planning and environmental impact statements does not federalize an otherwise locally funded project under NEPA or Section 4(f)); *Maryland Conservation Council, Inc.* v. *Gilchrist*, 808 F.2d 1039, 1043 (4th Cir. 1986) (federal funds for preliminary planning was too small a portion of total project cost to render the project federal for Section 4(f) purposes).

4. Petitioners seek (Pet. 22-24)to construct a circuit conflict between *Citizens for Balanced Env't*, upon which the court below relied, and the outdated and factually distinct decision in *La Raza Unida* v. *Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971), aff'd, 488 F.2d 559 (9th Cir. 1973), cert. denied, 417 U.S. 964 (1974). The supposed conflict between these cases, however, has been presented to this Court before and found unworthy of this Court's consideration. See *Citizens for Balanced Env't*, cert. denied, 423 U.S. 870 (1975). As the government pointed out in its brief in opposition to the petition for a writ of certiorari (at 4-5) in *Citizens for Balanced Env't*, No. 75-255, *La Raza Unida* "was not decided under NEPA," nor did the *La Raza* court consider the issue of major federal action under the current version of any of the environmental statutes cited by petitioner here. See *La Raza Unida*, 488 F.2d 559 (9th Cir. 1973) (listing statutory provisions at issue in that case). Thus, although the *La Raza* court made statements that appear to be at odds with the holdings in this case and in *Citizens for Balanced Env't*, there is no real conflict among these decisions[10] because

[10] Nor are the other cases cited by petitioners (Pet. 25-26) the source of any conflict. In all of these cases, the projects

there have been important intervening changes in federal environmental law since *La Raza*, and the regulatory scheme on which the *La Raza* court based its decision is no longer in effect.[11]

3. Finally, petitioners seek this Court's review of a question not addressed by the court of appeals, which was presented to that court for the first time in the petition for rehearing. Petitioners claim that the Montano Bridge project became a "major federal action" triggering NEPA obligations on the part of the FHWA very early in the planning phase when the need for a Corp of Engineers Clean Water Act permit for the project became manifest.

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in question had either proceeded with federal approval and funding through the design phase and to construction, or the evidence showed that those funds were avoided in a deliberate attempt to circumvent NEPA's obligations. See *Named Individual Members of San Antonio Conservation Soc'y* v. *Texas Highway Dep't*, 446 F.2d 1013, 1027 (5th Cir. 1971), cert. denied, 406 U.S. 933 (1972) (deliberate attempt to circumvent NEPA by improperly segmenting project); *Scottsdale Mall* v. *Indiana*, 549 F.2d 484, 489 (7th Cir. 1977), cert. denied, 434 U.S. 1008 (1978) (project had proceeded through design, preliminary engineering, and right of way acquisition); *Indian Lookout Alliance* v. *Volpe*, 484 F.2d 11, 16 (8th Cir. 1973) (no dispute that state seeking federal funding); *City of Boston* v. *Volpe*, 464 F.2d 254, 256-257 (1st Cir. 1972) (FAA allocated more than $1 million for taxiway construction).

[11] Since *La Raza* was decided 18 years ago, FHWA regulations have eliminated the discrete actions of location and design approval that the *La Raza* court had used as triggers for the obligation to comply with federal environmental obligations. The regulations now incorporate the procedures mandated by NEPA directly into the highway development process. Compare 23 C.F.R. Pt. 1, App. A, Policy and Proc. Mem. 20-8 (1971) with 23 C.F.R. Pt. 771 (1984).

Petitioner's contention must fail. Petitioners cite no court of appeals or other decisions holding a federal agency responsible for environmental compliance on the basis of federal action by a completely unrelated agency. Compare *Macht* v. *Skinner*, 916 F.2d at 18-19 (Department of Transportation has no NEPA or Section 4(f) obligations for local project, despite ultimate need for Corps of Engineers Section 404(b) permit). As the lower courts found in this case, there is no federal action by the FHWA that would obligate *that agency* [12] to insure compliance with federal environmental standards. Pet. App. 20a, 55a. Without such action, neither NEPA nor the other cited federal environmental statutes come into play.

Apart from the obvious flaws in this argument, review of this issue is not warranted because it was not properly raised in the court of appeals, and was therefore not addressed in the court of appeals' decision.

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[12] Petitioners have prosecuted a separate action against the only federal actor remaining, the Army Corps of Engineers, alleging violations of NEPA, the Clean Water Act, and the National Historic Preservation Act. *Village of Los Ranchos de Albuquerque* v. *Hatch*, Nos. 90-2026 & 90-2052 (10th Cir.). In that case, it is not disputed that issuance by the Corps of a permit under the Clean Water Act is federal action within the meaning of NEPA. The primary dispute centers on the extent to which that federal action will significantly affect the human environment. The district court concluded that the Corps of Engineers fully complied with its procedural obligations under NEPA and granted summary judgment for the government. That judgment is presently on appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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